United States Court of Appeals

for the Second Circuit

APPELLEE'S SUPPLEMENTAL APPENDIX

ORIGINAL

76-7591 & 76-7613

United States Court of Appeals

For the Second Circuit.

UNITED STATES COURT OF APPEALS
APR 22 1977

ISRAEL AIRCAFT INDUSTRIES, LTD., ZOHAR LANDAU, NIRA LANDAU, MORDECHAI MUSCATEL, ZILA MUSCATEL, HAGAI KOREN and DALIA KOREN,

Plaintiffs,

ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, MORDECHAI MUSCATEL and HAGAI KOREN,

Plaintiffs-Appellants,

v.

STANDARD PRECISION A DIVISION OF ELECTRONIC COMMUNICATIONS, INC., ELECTRONIC COMMUNICATIONS, INC., THE NATIONAL CASH REGISTER COMPANY and NORTH AMERICAN ROCKWELL CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL APPENDIX OF APPELLEES.

(Pages 427a to End.)

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The Motion and the Cross-Motion.

Defendants move pursuant to Rule 37(d) of the Federal Rules of Civil Procedure to dismiss the Complaint for plaintiffs' failure to comply with defendants' Notice of Taking Depositions.

Plaintiffs' cross-move pursuant to Rule 26(c) of the Federal Rules of Civil Procedure for a Protective Order precluding all further discovery on the grounds that further discovery would be cumulative and repetitious of the extensive discovery which had already been conducted, as well as oppressive, burdensome, unnecessarily expensive and would delay the trial of this action.

POINT I

THE PERSONS MOVANT SEEKS TO EXAMINE ARE NOT "* * * OFFICERS, DIRECTORS OR MANAGING AGENTS OF A PARTY * * *"

The defendants, by this application, invoke the wrong Rule and seek a remedy for which there is no provision in the circumstances. Apparently, what the defendants really seek is leave to take the depositions of further witnesses to which they are not entitled under any Rule.

Seven key witnesses have already been produced by the plaintiffs and these witnesses have been deposed at length by defendants' counsel. Also, this case has been set down for imminent trial. The defendants' application, therefore, is untimely as well as being improperly based. As appears in detail in the plaintiffs' Affidavit in Opposition to the Motion to dismiss, of the fourteen persons noticed for depositions, sever have already been produced, two are not employees nor within the control of plaintiffs and one is no longer living. Of the remaining four, two are

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subordinate to persons who have already been deposed and the remaining two are senior engineers whose testimony would be cumulative.

Not one of the additional persons whom defendants seek to depose could remotely be considered "an officer, director or managing agent of a party", within the meaning of Rule 37(d) of the Federal Rules of Civil Procedure as that Rule has been consistently interpreted by the Courts. Prima facie, none of the additional witnesses which defendants seek are "officers or directors". As to the remaining category under the Rule, that of managing agent, the defendants' application must also fail because defendants have not sustained their burden of proof. In fact, no basis whatever is presented to support a determination that any of the persons sought to be examined are "managing agents". In *Shenker v. United States,* 25 F.R.D. 96 (E.D.N.Y. 1960), the Court defined a managing agent as follows:

> "* * * a person who is vested with general supervisory authority with full power to exercise judgment and discretion in managing and dealing with the principal's interest in the subject matter of the litigation and is loyal to the principal, is a managing agent." 25 F.R.D. at 99.

The additional persons whom defendants seek to depose are all engineers who performed specific technical functions for plaintiff Israel Aircraft Industries, Ltd. in the design and development of aircraft and related products. They do not exercise general supervisory authority, judgment or discretion in corporate matters of the plaintiff nor in the subject matter of this litigation. Any discretion or judgment which may have been exercised related only to the performance of the specific tasks assigned to them or to their department.

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In *Proseus v. Anchor Line Ltd.*, 26 F.R.D. 165 (S.D.N.Y. 1960), the Court held:

> "There can be no doubt in the present case that the crew members do not qualify as officers or managing agents of third party plaintiff, and that as mere employees they need not be produced by it for examination." 26 F.R.D. at 167.

All of the additional persons whom defendants seek to examine are employees. And the plaintiff does not have any obligation to produce them.

The case of *Santiago v. American Export Lines, Inc.*, 30 F.R.D. 373 (S.D.N.Y. 1962) involved a plaintiff seaman who was allegedly injured as a result of a faulty air conditioning system aboard a vessel. The plaintiff sought to examine the defendant's chief engineer, who was in charge of the air conditioning system at the time of the incident. The Court held that the chief engineer was not a managing agent of the owner of the vessel and that the defendant owner, therefore, was not required to produce him for a deposition. The Court reasons as follows:

> "In light of the analysis of the cases, there must be a showing that the deponent sought to be examined as a managing agent was in control of the vessel at the time the accident occurred. In a doubtful case the ultimate determination as to who was in control could be left to the trial court. However, control of only a portion of the activities is not sufficient to call up this procedure." 30 F.R.D. at 374.

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Additionally, the Court held that the supervisor of a small group of employees is not included in the term "managing agent". Similarly, it cannot be serious contended that any of the persons now sought to be examined had any authority, discretion or judgment, relating to any aspect of the corporation or this litigation.

In *Hughes Bros., Inc. v. Callanan Road Improvement Co.*, 41 F.R.D. 450 (S.D.N.Y. 1969), the plaintiff noticed for oral examination the Vice President and two other named employees of the defendant. After producing the Vice President, the defendant declined to produce the two employees. The plaintiff argued that the employees sought to be deposed had duties of examining and supplying a particular vessel which was the subject of the accident. It was the Court's opinion that the employees were not supervisory and, therefore, no sanction could be imposed under Rule 37(d). The Court was also of the opinion that a "willful" failure to appear was an additional requirement for the imposition of the sanctions provided by Rule 37(d) and that there is no willful failure to produce if there is a reasonable basis for a party to believe that there is no obligation to produce particular employees.

This Court had recent occasions to consider whether a corporation's general counsel was a "managing agent" in the case of *Transcontinental Motors, Inc. v. NSU Motorenwerke AKT.*, 45 F.R.D. 37 (S.D.N.Y. 1968). It was held again that the burden of proving the capacity of the witness as a managing agent rests with the party seeking the deposition. In the case at bar, defendants have not only failed to sustain that burden but have included no facts whatever in support of their application.

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POINT II

THE EXAMINATION OF ANY ADDITIONAL EMPLOYEES OF THE PLAINTIFF WILL BE OPPRESSIVE, UNDULY BURDENSOME AND UNNECESSARILY EXPENSIVE

Rule 26 of the Federal Rules of Civil Procedure provides for the issuance of a Protective Order to limit discovery which would result in "* * * annoyance, embarrassment or undue burden or expense * * *."

Plaintiffs have already produced seven witnesses, all of whom are essential and highly skilled employees of plaintiff Israel Aircraft Industries, Ltd. These witnesses, were transported from Israel for depositions in New York at considerable expense and at a substantial loss of valuable time to Israel Aircraft Industries, Ltd. They have testified in depth, to every relevant area of inquiry explored by defendants' counsel.

No specific reasons are given the Court to justify the additional expenditures in time and money required to produce additional witnesses. Of the five remaining witnesses who are in the control of plaintiff Israel Aircraft Industries, Ltd. none has any additional relevant or material information which could serve any useful purpose in this lawsuit. Mr. Sutton has already testified, as the head of the inspection department to all lines of inquiry to which Mr. Gilboa, his subordinate, could possibly testify. Mr. Blumkin has already testified to all of the lines of inquiry to which Mr. Ackerman, his subordinate, could possibly testify. Mr. Yahalom, the test pilot of an aircraft which was observing the movements of the subject aircraft has nothing to add to the testimony already elicited from the co-pilot of the subject aircraft, as well as the testimony of the two crew members, Messrs. Landau and

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Muscatel, who have also testified. The testimony of Messrs. Sivan and Offer could only be duplicative and cumulative of the testimony already provided by Mr. Yacobi, the project manager, and Mr. Blumkin, who is presently a vice-president and was the head of the mechanical design department at the time of the subject accident.

Plaintiffs have noticed for depositions thirteen employees of defendants and defendants, in turn, have noticed the depositions of fourteen employees of plaintiffs. In May and June of 1974, defendants agreed that they would produce four witnesses and plaintiffs agreed to the production of seven witnesses.

As already discussed, plaintiffs are not required to produce "mere employees", Point I, *supra*. Additionally, the primary purpose for defendants' request is obviously harassment and delay. As recently stated by this Court, in *Hughes v. General Motors Corp.*, 18 F. R. Serv. 2d 1249 (S.D.N.Y. 1974):

> "* * * No good cause exists to require defendant to submit its president for a deposition when it is clear that the information plaintiff wants is available through other employees of defendant, and such employees have been questioned or on plaintiff's request can be questioned. The request borders on harassment and would at best result in a duplication of testimony. See *New Sanitary Towel Supply, Inc. v. Consolidated Laundries, Corp.*, 24 F.R.D. 186 (SDNY 1959)." 18 F. R. Serv. 2d 1250.

Defendants have had more than ample opportunity to complete pre-trial discovery within the time provided by this Court. Indeed, defendants have succeeded in delaying the completion of discovery for ten months beyond

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the original completion date set forth by this Court and agreed upon by all parties.

In *Armstrong Cork Co. v. Niagara Mohawk Power Corp.*, 16 F.R.D. 389 (S.D.N.Y. 1954) the Court vacated a notice to depose 22 employees and allowed the defendant to proceed with the depositions of only three of the officers of the corporation who were noticed. The Court recognized that:

> "The court should be alert to see that the liberal deposition procedure provided in the Federal Rules is used only for the purpose for which it is intended and is not used as a litigation tactic to harass the other side or cause it wasteful expense. See 'Tactical Use and Abuse of Depositions under the Federal Rules', 59 Yale L. J. 117 (1949)."

In the case at bar plaintiffs, at considerable expense of time and money, have already produced seven key personnel who testified extensively and thoroughly to every area of inquiry. In *New Sanitary Towel Supply v. Consolidated Laundries Corporation,* 24 F.R.D. (S.D.N.Y. 1959), the Court recognized that cumulative and duplicative testimony should be avoided. The Court reasoned:

> "Indeed, the defendants, other than to assert a right as litigants to examine an opposing party, advance no substantial or valid reason for the examinations. The right to take a deposition of a party is subject to various limitations enumerated in the Rules, all summed up in the Court's power under Rule 30(a) to 'make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.' The Courts, in harmony with the spirit of

> the Rules, have applied them with liberality, but such a policy does not justify an examination which can serve no useful purpose in furthering the defendants' cause other than to afford an opportunity to vex and harass an opposing litigant * * *." 24 F.R.D. at 189.

Accordingly, it is respectfully submitted that the Court should exercise its discretion and preclude defendants from obtaining further discovery on the grounds that any further depositions would be repetitious and would only serve to harass the plaintiffs and delay the trial of this action.

Conclusion

It is respectfully submitted that defendants' Motion to Dismiss the Complaint should be denied in all respects and the plaintiffs' Cross-Motion for a Protective Order should be granted along with any further relief which to this Court may appear just and proper in the circumstances.

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Israel Aircraft Industries, Ltd.'s Memorandum of Law in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Cross-Motion for a Protective Order, Filed November 18, 1974.

THE MOTION AND THE CROSS-MOTION

Defendants move pursuant to Rule 37(d) of the Federal Rules of Civil Procedure to dismiss the Complaint for plaintiffs' failure to comply with defendants' Notice For Production of Documents.

Plaintiffs' cross-move pursuant to Rule 26(c) of the Federal Rules of Civil Procedure for a Protective Order precluding all further discovery on the grounds that further discovery would be cumulative and repetitious of the extensive discovery which had already been conducted, as well as oppressive, burdensome, unnecessarily expensive and would delay the trial of this action.

POINT I

MOVANT HAS FAILED TO COMPLY WITH LOCAL RULE 9(f)

The defendants have failed to comply with Rule 9(f) of the Local Rules of this Court, which provides:

> "No motion of the type described in subparagraph (1) of subdivision (c) of this rule shall be heard unless counsel for the moving party files with the court at or prior to the argument an affidavit certifying that he has conferred with counsel for the opposing party in an effort in good faith to resolve by agreement the issues raised by the motion without the intervention of the court and has been unable to reach such an agreement. If part of the issues raised by motion have been resolved by agreement the affidavit shall specify the issues so resolved and the issues remaining unresolved."

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Defendants' moving papers do not contain an affidavit as described in Rule 9(f) and, accordingly, this motion should not be considered by this Court.

The purposes of this Rule are obvious and if complied with by defendants' counsel would have prevented the waste of the Court's, as well as counsel's, time expended on this motion.

The affidavit of Dennis Murphy in support of defendants' Motion to Dismiss the Complaint refers to plaintiffs' failure to produce documents and failure to answer interrogatories. As stated in the affidavit of Marshall S. Turner in opposition to defendants' motion, plaintiffs have produced all relevant documents in their possession. Additionally, one technical report and several photographs will be produced in the near future. Also as stated in the affidavit of Mr. Turner, an oral agreement was reached between plaintiffs' and defendants' counsel, whereby answers to interrogatories were not required until requested by defendants' counsel after the completion of depositions. No such request has been made.

It is respectfully submitted that the Court should decline to consider defendants' Motion for failure to comply with the local rules of this Court.

POINT II

PLAINTIFFS ARE NOT REQUIRED TO PRODUCE DOCUMENTS WHICH ARE NOT WITHIN THEIR POSSESSION, CUSTODY OR CONTROL

Rule 34 of the Federal Rules of Civil Procedure provides, in part, for the production of documents ". . . within

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the scope of Rule 26(b) and which are in the possession, custody or control of the party. . . ."

Plaintiffs produced all the documents called for in defendants' Notice For Production of Documents dated July 5, 1973, which are in its possession, custody or control. Of the documents referred to in the affidavit of Dennis Murphy in support of defendants' Motion to Dismiss the Complaint, many documents which were not in the possession of plaintiffs had been obtained from various governmental agencies and provided to defendants along with translations which were obtained at considerable expense to plaintiffs.

Defendants now seek to discover documents and translations, which, if available, would be in the possession, custody or control of United States and Israeli governmental agencies. Since such documents are equally available to defendants as they are to plaintiffs, plaintiffs have no obligation to incur the burden and expense of obtaining them.

In *Service Liquor Distributors, Inc., v. Calvert Distillers Corp.*, 16 F.R.D. 507 (S.D.N.Y. 1954) the Court denied a motion to compel production of public documents. The Court stated:

> ". . . Items A(5), D and H relate to matters of public record and a proper showing of good cause must indicate their unavailability to plaintiff, or other reasons why plaintiff should not be required to get them independently of reliance of defendant. Accordingly, those items are denied. . . ." 16 F.R.D. at 508.

In the case at bar plaintiffs have, in good faith, produced many public documents which they had in their control. Defendants are now seeking public documents which

are not in the possession of plaintiffs and which plaintiffs are not certain exist. Upon information and belief defendants have made no effort to obtain such public documents from either the United States or Israeli governmental agencies involved.

In denying a motion for the production of documents, the Court, in *Wharton v. Lybrand, Ross Bros. & Montgomery,* 41 F.R.D. 177 (E.D.N.Y. 1966), stated:

> "The affidavit in support of the application also fails to show the existence of the documents requested. The moving party is charged with showing that the instruments sought to be produced under Rule 34 are in the "possession, custody, or control" of the party charged with compliance of the order. Ergo, it must be shown that there are such documents." 41 F.R.D. at 180.

Accordingly, since defendants have failed to identify any documents in the possession of plaintiffs, which have not been produced or are not in the process of being produced, plaintiffs have no further obligation to produce any additional documents.

POINT III

THE DISCOVERY SOUGHT BY PLAINTIFFS' MOTION WOULD BE OPPRESSIVE, UNDULY BURDENSOME AND UNNECESSARILY EXPENSIVE

Rule 26 of the Federal Rules of Civil Procedure provides for the issuance of a Protective Order to limit discovery which would result in ". . . annoyance, embarrassment or undue burden or expense. . . ."

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At a production of documents and marking session on January 10, 1974, plaintiffs produced hundreds of documents and design drawings relating to the aircraft which is the subject matter of this dispute. Subsequently, at various depositions, plaintiffs produced many additional documents and drawings, which constitute the total amount of documents, in its possession, which have any relevance to this action. Additionally, seven key employees have been brought from Israel to New York for depositions, at considerable expense in time and money to plaintiffs.

Most, if not all, of the documents referred to in the affidavit of Mr. Murphy have already been produced. The remaining documents do not exist or are not in the possession of plaintiffs. See affidavit of Marshall S. Turner, pp. 2, 3, 4 and 5. If defendants can be more specific in their reference to documents, perhaps plaintiffs' counsel could assist defendants' counsel in locating them among the documents which have already been produced.

No specific reasons are given the Court to justify the additional expenditure in time and money required for the production of additional documents. Similarly, no explanation is given for defendants' failure to comply with their agreement relating to the interrogatories.

In *Breeland v. Yale & Towne Manufacturing Co.*, 26 F.R.D. 119 (E.D.N.Y. 1960) the Court held that requiring a party to answer extensive interrogatories, in addition to depositions, was unduly burdensome. The Court reasoned:

> "In view of counsel's statement that subsequent to the procurement of answers to the interrogatories he would examine the defendant before trial, the Court is convinced that the use of the two proce-

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> dures would be an abuse of the interrogatory procedure within the meaning of Rule 33 . . . ." 26 F.R.D. 121.

In the case at bar, defendants have served 100 numbered interrogatories requiring a total of more than 200 answers from each plaintiff. As previously discussed, counsel for both sides agreed that plaintiffs would answer only those interrogatories specified by defendants at the completion of the depositions of plaintiffs. Virtually all of the interrogatories were answered at the depositions. To date, defendants have not requested, pursuant to their agreement, any additional answers.

Defendants have had more than ample opportunity to complete pre-trial discovery within the time provided by this Court. Indeed, defendants have succeeded in delaying the completion of discovery for 10 months beyond the original completion date set by this Court and agreed upon by all parties.

When all parties have had a full and fair opportunity to develop the facts of the case during extensive pre-trial discovery, it is incumbent upon the Court to protect the parties from harassment and undue burden and expense. In *Dolgow v. Andersen,* 53 F.R.D. 661 (E.D.N.Y. 1971), extensive discovery had been completed and all parties had a full and fair opportunity to frame the issues of the case. The Court held that it is essential in lengthy and complex cases, ". . . to supervise and limit discovery to protect parties and witnesses from annoyance and excessive expenses."

This Court has granted defendants several applications to extend the time for completion of discovery and has

Israel Aircraft Industries, Ltd.'s Memorandum of Law in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Cross-Motion for a Protective Order, Filed November 18, 1974

adjourned the trial date from the first week of January, 1974 to October 15, 1974. Now on the eve of trial defendants seek:

1. Discovery of documents, which have already been produced;

2. Discovery of documents, which have never been noticed or are not in the possession of plaintiffs; and

3. Answers to interrogatories, which both sides have agreed need not be answered.

The case of *Russell v. Unipress Co. v. St. Agnes Hospital,* 15 F.R. Serv. 2d 845 (E.D. Pa. 1971), involved a similar situation. In that case, plaintiff served interrogatories and requests for admissions after the Court advised that the case would be reached for trial within two months. The Court stated:

> "Plaintiff's motions [to compel answers to interrogatories and for default judgment for failure of defendant to answer interrogatories] will be denied. This case is over two-and-a-half years old and the parties have had more than ample time to conduct full and fair discovery. `To compel defendant to conduct extensive discovery at this time would be unduly prejudicial and burdensome. In addition it might well improperly delay the trial of the case. Furthermore we see no prejudice which will result from the denial of plaintiff's motions in view of the time which has been afforded for the preparation of plaintiff's case and the statement of plaintiff's counsel that he would be ready to proceed to trial after October 4." 15 F.R. Serv. 2d at 845.

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As in the *Russell* case, all parties in the case at bar have had a full and fair opportunity to complete discovery. Defendants will not be prejudiced by the denial of further discovery, since plaintiffs have produced all relevant documents in their possession and virtually all interrogatories were answered at the depositions.

For plaintiffs to be compelled to answer interrogatories and produce additional documents, would be repetitious and cumulative of prior discovery and an undue burden and expense. Additionally, plaintiffs would be prejudiced, since the trial would be further delayed. See *Russell v. Unipress Co., supra; Oskar Tiedeman & Company v. United States,* 172 F. Supp. 609 (D.C. Del. 1959).

It is respectfully submitted that further discovery would be prejudicial and burdensome as well as delay the trial of this action.

CONCLUSION

It is respectfully submitted that defendants' Motion to Dismiss the Complaint should be denied in all respects and the plaintiffs' Cross-Motion for a Protective Order should be granted along with any further relief which to this Court may appear just and proper in the circumstances.

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Israel Aircraft's Memorandum of Law in Opposition to Motion to Compel Production of Parts, Filed November 7, 1975.

THE MOTION

Defendants move for an Order pursuant to Rule 34(a) of the Federal Rules of Civil Procedure to compel the production of wing flap actuators for re-examination.

Plaintiffs oppose this motion on the grounds that defendants have already had unrestricted possession and control of the wing flap actuators and that permitting further discovery, more than ten months after the Pre-Trial Order was agreed upon and submitted to the Court, would be prejudicial to plaintiffs and would delay the trial of this action.

DEFENDANTS' MOTION FOR PRODUCTION OF PARTS—MORE THAN A YEAR AFTER THIS COURT ORDERED THE COMPLETION OF DISCOVERY AND ON THE EVE OF TRIAL—IS UNTIMELY

The purpose and intent of Rule 34, and indeed all of the discovery provisions of the Federal Rules of Civil Procedure, is to allow free and open discovery by all parties to eliminate the elements of chance and surprise at trial. However, every case reaches a point when further discovery must be foreclosed.

Although Rule 34 does not set forth a specific time limitation for the production of documents and things, it is clear that in the absence of special circumstances and when all parties have had sufficient time to complete their discovery, the Court will not permit the use of Rule 34 on the eve of trial.

Savannah Theatre Co. v. Lucas & Jenkins, 8 F. R. Serv. 34.12, Case 2 (S. D. Ga. 1944) was an action which had been pending for five years and had been set for trial on January 24. When the trial was postponed on January 22, the plaintiff moved for production of docu-

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ments on January 31. In denying the motion for production, the Court stated:

> ". . . The normal use and function of Rule 34 is to facilitate the preparation for trial, and it is clear that in ordinary circumstances any motion desired for this purpose should be brought on in ample time before the trial date for its orderly disposition. If extraordinary circumstances arise or information comes to light the existence of which could not reasonably have been foreseen which would justify a late and most tardy motion under such rule, it is certainly incumbent upon the moving party to establish them. In such circumstances it is evident that the establishment of such circumstances or recent development is an element of the 'good cause' which the moving party must show. On this motion no such cause is shown." 8 F. R. Serv. at 34.12.

Although the requirement of "good cause" was deleted from the rule by amendment in 1970, the principles involved in the *Savannah Theatre* decision are still valid.

In *McCullough v. Dairy Queen, Inc.*, 195 F. Supp. 918 (E. D. Pa. 1961) the Court denied defendant's motion for production of documents, stating:

> ". . . The case was to be heard finally on the merits on June 27, 1961. It was not until June 8, 1961, that the defendant filed the motion now before us. Even if we considered the documents sought to be produced as relevant to the subject matter of this action, and even if the requests of the motion were properly limited in scope, we would hesitate at this late date, practically on the eve of trial, to order plaintiffs to gather together and produce those documents for the defendant." 195 F. Supp. at 919.

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Defendants contend that because their previous examination of the parts had been completed prior to agreeing to and filing the Pre-Trial Order on December 31, 1974, the precise allegations of negligence and breach of warranty were not fully known. Apparently defendants consider this to be special circumstances sufficient to re-open discovery. Even if defendants were correct, and it is evident that they are not, they failed to explain why they waited more than ten months after the Pre-Trial Order was agreed upon before making this motion.

The wing flap actuators are the most important exhibits in plaintiffs' case. If the parts are damaged or lost in testing or transit, it would be impossible for plaintiffs to replace or repair the part.

As stated in *Home Insurance Co. v. Cleveland Electric Illuminating Co.*, 7 F. R. Serv. 2d 34.621, Case 1:

> "In this case the object sought to be tested is unique in that it will constitute an important exhibit in plaintiff's case. Since the case is due for trial very soon the switch could not be replaced in time if damages resulted. Even slight damage would reduce its value as an exhibit.
>
> Accordingly, the motion is denied." 7 F. R. Serv. 2d at 731.

Defendants have failed to demonstrate any special circumstances to justify the necessity of re-examination of the wing flap actuators. Defendants' experts had exclusive possession and control of all of the existing parts from June 28, 1974 to September 18, 1974. The parts were not returned to plaintiffs until defendants' experts called plaintiffs' counsel and advised that all testing had been completed. Accordingly, defendants had more than ample opportunity to conduct all necessary tests.

Israel Aircraft's Memorandum of Law in Opposition to Motion to Compel Production of Parts, Filed November 7, 1975

Goldboss v. Reimann, 55 F. Supp. 811 (S. D. N. Y. 1943) involved a stockholder's derivative action in which plaintiffs' motion for production of documents was denied. The Court held that:

> "In view of the lapse of more than one year since the last motion for summary judgment was denied, the opportunity which plaintiff has had to inspect of which she availed herself for nearly five months, the examination of which she did not avail herself, and of the fact that if she had been improperly or arbitrarily denied any of those privileges, such deprivation or denial occurred last October, since which time she has had plenty of opportunity to apply to this court for whatever relief she may have been entitled to, her motion now comes with ill grace and convinces me that it is not made in good faith but solely to prolong this litigation." 55 F. Supp. at 821.

In the case at bar defendants not only had the opportunity to examine the parts, they actually had them in their possession and tested them for two and one-half months.

As plaintiffs argued in opposition to plaintiffs' two previous motions for further discovery in October of 1974, defendants have had more than ample opportunity to complete all possible discovery. Now, one year after defendants two previous motions were denied by this Court and more than ten months after this case was placed on the Court's 24 hour ready trial calendar, defendants seek the duplication of discovery which they have previously had.

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It is respectfully submitted that further discovery would be untimely, prejudicial to plaintiffs, and would delay the trial of this action.

Conclusion

It is respectfully submitted that defendants' motion for production of the wing flap actuators be denied along with any further relief which to this Court may seem just and proper in the circumstances, including costs and disbursements of this motion.

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Plaintiffs' Second Supplemental Requests to Charge.

Plaintiffs respectfully request this Court to include in its charge to the jury prior to its deliberations the following:

LOSS OF INTEREST ON INVESTMENT

Plaintiff Israel Aircraft Industries, Ltd. also claims that inherent in the loss of aircraft 029 was the delay of the entire 1123 aircraft certification program for a period of 8 months until a replacement aircraft was available. If you find that this delay was the natural and direct result of the loss of aircraft 029, then plaintiff Israel Aircraft Industries, Ltd. is entitled to recover an additional sum sufficient to compensate it for the period of time reasonably required to obtain a replacement. This additional sum should be calculated on the basis of interest on plaintiff Israel Aircraft Industries, Ltd.'s investment of $18,500,000 for the 8 months it took to replace aircraft 029.

P.J.I. 2:310
McCormick, *Damages*, §124, p. 472-476.

Respectfully submitted,

CONDON & FORSYTH
Attorneys for Plaintiff, Israel Aircraft Industries, Ltd.
WILLIAM L. SCHIERBERL
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New York, New York 10020

Israel Aircraft Industries, Ltd.'s Motion to Amend Complaint Pursuant to Rule 15(b).

Plaintiff, Israel Aircraft Industries, Ltd., moves this Court pursuant to Rule 15(b) of the Federal Rules of Civil Procedure for leave to amend its Amended Complaint to conform with the evidence in the following particulars:

1. Amending paragraph "38" of the First Claim for Relief on Behalf of Plaintiff Israel Aircraft Industries, Ltd. to read as follows:

> 38. Solely as a result thereof, plaintiff Israel Aircraft suffered the loss of the Aircraft and loss, damage and destruction of property and technical equipment on board the Aircraft, all to its damage in the sum of Two Million Six Hundred Thousand ($2,600,000.00) Dollars;

2. Amending subsection (1) of the demand paragraph of plaintiff Israel Aircraft Industries, Ltd. to read as follows:

WHEREFORE, plaintiff Israel Aircraft Industries, Ltd. demands judgment:

> (1) jointly and severly against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., and The National Cash Register Company, on the First Claim for Relief in the amount of Two Million Six Hundred Thousand ($2,600,000.00) Dollars, with interest from January 21, 1970;

All together with costs and disbursements of the action.

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Zohar Landau, Nira Landau, Mordechai Muscatel, Zita Muscatel, Hagai Koren and Dalia Koren's Memorandum of Law in Opposition to Plaintiff Israel Aircraft Industries, Ltd.'s Motion for Summary Judgment Pursuant to Rule 56(b) of the Federal Rules of Civil Procedure Dismissing the Defendants' Counterclaims, Filed May 3, 1976.

INTRODUCTION

Technically, plaintiffs, Landau, Muscatel and Koren, have no standing to object to the granting of Israel Aircraft's motion for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure dismissing the defendants' counter-claims. The crew members (Landau, Muscatel and Koren) have no claims against Israel Aircraft and no interest in the counter-claims. What the crew members are concerned about is the *basis* upon which Israel Aircraft moves for summary judgment dismissing the counter-claims and the "other and further relief" that Israel Aircraft seeks.

In essence, Israel Aircraft is claiming on this motion that because of certain "releases" allegedly given by the crew members to their employer, Israel Aircraft, the crew members can recover no more than 35% of the judgment that they have obtained against the defendants.

ISRAEL AIRCRAFT IS BARRED BY THE FEDERAL RULES OF CIVIL PROCEDURE FROM RAISING THE CLAIM OF RELEASE AT THIS TIME.

The "release" signed by Zohar Landau, is dated January 20, 1971.

The "release" signed by Mordechai Muscatel, is dated March 1, 1971.

The "release" signed by Hagai Koren, is dated July 3, 1970.

The summons and complaint in this action was first filed by the plaintiffs on December 21, 1972 by the firm of Condon & Forsyth, who at that time represented all the plaintiffs.

Zohar Landau, Nira Landau, Mordechai Muscatel, Zita Muscatel, Hagai Koren and Dalia Koren's Memorandum of Law in Opposition to Plaintiff Israel Aircraft Industries, Ltd.'s Motion for Summary Judgment Pursuant to Rule 56(b) of the Federal Rules of Civil Procedure Dismissing the Defendants' Counterclaims, Filed May 3, 1976

On April 19, 1973, plaintiffs served an additional summons and amended complaint.

On July 5, 1973, answers to plaintiffs' amended complaint were served upon Condon & Forsyth, attorneys for all the plaintiffs. The answer of each defendant contained a counter-claim against Israel Aircraft Industries, Ltd. for contribution and/or indemnity arising out of Israel Aircraft's negligence and/or wrongful acts which caused or contributed to the loss of 029 and the injuries to the crew members.

Rule 12 of the Federal Rules of Civil Procedure requires that, "The plaintiff shall serve his reply to a counter-claim in the answer within twenty days after service of the answer.". Rule 8(c) of the FRCP requires that,

> In pleading to a preceding pleading,
> a party shall set forth affirmatively
> *accord and satisfaction*
> arbitration and award
> assumption of risk
> contributory negligence
> discharged in bankruptcy
> duress
> estoppel
> failure of consideration
> fraud
> illegality
> injury by fellow servant
> laches
> license
> *payment*

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release
res judicata
statute of frauds
statute of limitations
waiver
and any other matter constituting
an avoidance or affirmative defense.

Rule 12 required Israel Aircraft to reply to the counterclaims contained in the defendants' answer. Rule 8 required that Israel Aircraft plead as an affirmative defense accord and satisfaction, payment and/or release.

Although Israel Aircraft knew since March of 1971 of the existence of these "releases" they deliberately failed to serve a reply to defendants' counterclaims or to affirmatively plead the presence or existence of those "releases".

Rule 12(b) of the FRCP provides that, "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto if one is required."

It is now more than six years since 029 went down and its crew members were injured. In all this time, Israel Aircraft possessed these "releases" and concealed them from the court and the defendants in violation of the Federal Rules of Civil Procedure. Now, having received an unsatisfactory verdict at the hands of the jury, Israel Aircraft seeks to raise these "releases" for the first time to escape the effects of the jury's verdict.

Two questions present themselves immediately to the reader's mind: Has Israel Aircraft been deliberately withholding and concealing the existence of these "releases"

Zoh[illegible] Landau, Nira Landau, Mordechai Muscatel, Zita Muscatel, Hagai Koren and Dalia Koren's Memorandum of Law in Opposition to Plaintiff Israel Aircraft Industries, Ltd.'s Motion for Summary Judgment Pursuant to Rule 56(b) of the Federal Rules of Civil Procedure Dismissing the Defendants' Counterclaims, Filed May 3, 1976

or are they not in fact "general releases"? The answer is that the documents signed by the three crew member plaintiffs are not and were never intended to be general releases. They are and were never intended by IAI or the crew members to be anything more than deeds of release and full and final accords of the crew members' workmen's compensation claims against their employer. It is only now that Israel Aircraft has received a severe disappointment at the hands of the jury that IAI seeks to turn these workmen's compensation agreements into general releases.

In order for Israel Aircraft to plead these "releases" they would have to seek leave of this court to serve a reply to the counter-claims contained in the defendants' answer, submit an affidavit of merits, and demonstrate an awfully good legal excuse why they waited almost six years to bring these "releases" to light.

To raise these "releases" now for the first time would subject the crew members to the greatest prejudice and delay in the entry and execution of their judgment. The nature and validity of these "releases" could have and should have been resolved at least three years ago and not kept hidden "close to the vest" until Israel Aircraft could see what kind of verdict the jury would bring in. Israel Aircraft is guilty of laches and inexcusable delay in moving for summary judgment or to serve a reply to defendants' counter-claims at this time.

Moreover, we have been informed by the attorneys for Israel Aircraft that they intend to bring a declaratory judgment action in Israel to have the relative rights, obligations and responsibilities of Israel Aircraft and the

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crew members and the effect of these "releases" adjudicated by a court of competent jurisdiction in Israel. Because these "releases" were drafted, signed and executed in Israel between Israelis under Israeli law, I think it would be improvident for a Federal Court in New York to inject itself into a dispute which is purely local in origin and does not directly concern this lawsuit. Clearly, Israel Aircraft has no standing to raise a "release" in order to prevent the crew members from collecting one hundred percent of their judgment from the defendants in this action. Whether or not the crew members must under Israeli law repay some portion of their recovery to Israel Aircraft is unquestionably a matter of local Israeli law best handled by an Israeli court. Both Israel Aircraft and the crew members have already retained counsel in Israel for this purpose, and, if litigation has not already been started in Israel, it is about to be.

EVEN ASSUMING THAT THE DEED OF RELEASE AND FULL AND FINAL ACCORD SIGNED BY THE CREW MEMBERS CONSTITUTES A "GENERAL RELEASE" IT CANNOT IN ANY WAY EFFECT THE CREW MEMBERS' RIGHTS TO RECOVER THE FULL AMOUNT OF THEIR JUDGMENT FROM THE DEFENDANTS.

Condon & Forsyth, state on page 7 of their "Plaintiff Israel Aircraft Industries, Ltd.'s Post Trial Memorandum of Law" that, "The laws of the State of New York and Israel are similar with regard to the reduction of a plaintiff's recoverable damages by the amount of a released tort feasor's share of the damages." In some respects that is true, but in the area here controlling, that statement is not correct.

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Clearly, no one will argue that the effect of such a "release" even if it be considered a general release must be determined under the laws of the place where it was executed and delivered. In this case, that would be Israel.

Accepted in evidence at the trial of this action was the official English translation of the Civil Wrongs Ordinance (New Version) of Israel.

For arguments sake only, let us assume that the crew members' claim against their employer is to be regarded as a third party claim and not as a workmen's compensation claim. Section 83 of the Civil Wrongs Ordinance (New Version) provides as follows:

> (a) For damages suffered by any person as a result of a civil wrong, judgment recovered against a civil wrongdoer liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint civil wrongdoer in respect of the same damage.

In other words, if defendants A and B are jointly negligently responsible for the injuries to a plaintiff, then the plaintiff may sue first one defendant, recover and collect on a judgment, and then still go ahead and sue the second defendant.

Section 83(b) of the Civil Wrongs Ordinance (New Version) then provides as follows:

> If more than one action is brought in respect of the same damage by the person by whom it was suffered, or for the benefit of the estate, or of the spouse, parent or child, of that person, against civil wrongdoers liable in respect of the damage (whether it is joint civil wrongdoers or otherwise),

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> the sums recoverable under the *judgments* given in those actions by way of compensations shall not in the aggregate exceed the amount of the compensation awarded by the judgment first given which is not reversed on appeal, or as varied on appeal; and in any of those actions, other than that in which judgment is first given as aforesaid, the plaintiff shall not be entitled to costs unless the court is of the opinion that there was a reasonable ground for bringing the action, where the judgment first given is given against an employer, within the meaning of Section 82, in circumstances as referred to therein, the amount of the compensation awarded by the judgment first given shall, for the purposes of this section, be replaced by the amount which would have been awarded but for Section 82. (Section 82 has to do with the reduction of sums paid by an employer to an injured employee of the amount received by the employee from the National Insurance Institute. That sub-section has no application here).

What sub-section (b) means, is that if a plaintiff is injured by defendants A and B, both of whom are negligent and sues and recovers the judgment only against A and the plaintiff then goes ahead and sues and recovers the judgment against B, the judgment against B may not exceed the judgment against A. One may then wonder, why bother to sue B? The answer is, assuming the plaintiff got a judgment against A for $100,000.00 but was only able to collect $50,000.00 of it from A, plaintiff could still sue and obtain a judgment against B and collect up to

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$50,000.00 from B. This way the plaintiff would not collect more than the amount of money obtained in the judgment against A. If, on the other hand, the plaintiff sued and recovered a judgment against A for $100,000.00 and collected that $100,000.00, then under Section 83(b) there would be no point in him proceeding to judgment against B. The key word in Section 83 is "judgment". If the plaintiff does not in fact proceed to and obtain a judgment against the defendants first sued, then Section 83 has no application. A settlement, a release, an accord and satisfaction, do not under Israeli law bar or in any way effect the plaintiff's rights to proceed to judgment and collect the full amount thereof from a second negligent defendant.

The section of the Civil Wrongs Ordinance (New Version) that *is* applicable here is Section 84, which provides as follows:

> (a) Any civil wrongdoer liable in respect of the damage may recover contribution from any other civil wrongdoer who is, or would *if sued* have been, liable in respect of the same damage, whether as a joint civil wrongdoer or otherwise, so, however, that no person shall be entitled to recover contribution under this subsection from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

The crew members have never sued Israel Aircraft. Therefore, the defendants' counter-claim against Israel Aircraft for contribution and/or indemnification is predicated upon Section 84(a) of the Civil Wrongs Ordinance (New Version).

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Section 84(b) then provides that:

> In any proceedings for contribution under this section, the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to that person's responsibility to the damage; and the court shall have power to exempt any persons from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

The foregoing is exactly what the jury has done in this case; they have listened to the evidence and determined the percentage of contribution that Israel Aircraft should make to the defendants in consequence of the payments made by the defendants to the injured crew members.

At first blush, the law involved here may seem novel. But actually this situation occurs thousands of times a year in this State in every situation where an employee is injured on the job. The employee makes a claim or brings a third party action against someone other than his employer who may be responsible for his injuries. The employer is not sued by the employee because of the workmen's compensation law. But what customarily happens is that the defendant who is being sued by the employee brings a third party action against the employer. It is no defense to the employer in the third party action that the injured employee's exclusive remedy against the employer is in workmen's compensation. This is because the claim is not being made by the employee but by a third party who is unaffected by the workmen's compensation

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law. The right of an injured employee to sue a third party in addition to collecting benefits under the workmen's compensation law is codified and specifically set forth in Section 29 of the Workmen's Compensation Law. (See *Metildi v. State*, 177 Misc. 179, 30 N. Y. S. 2d 168, for an illustrative case thereunder).

In a typical workmen's compensation/third party litigation, an employee is injured on the job. His employer pays him under workmen's compensation, say, $1,000.00. The injured employee brings a negligence action against a third party he feels responsible for his injury. The third party sues the injured plaintiff's employer in a third party action. Under CPLR 1401 *et seq.* (which is nothing more than a codification of *Dole v. Dow Chemical Co.*, 1972, 30 N. Y. 2d 143, 331 N. Y. S. 2d 382, 282 N. E. 2d 288) the trier of the fact can apportion responsibility between the third party defendant and the injured plaintiff's employer. Assuming, hypothetically, that the injured plaintiff employee recovers a verdict against the defendant of $10,000.00 and that the jury finds that the defendant and the plaintiff's employer were equally culpable, the following mathematics takes place:

(1) The defendant pays the injured plaintiff employee $10,000.00;

(2) Plaintiff's employer pays the defendant $5,000.00;

(3) The injured plaintiff employee pays to his employer $1,000.00 in full payment and satisfaction of the employer's compensation lien. This process is mechanically repeated so many times in the State of New York and indeed probably throughout the country that citations, therefore,

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are almost meaningless. *Clark v. Monarch Engineering Co.*, 1927, 129 Misc. 145, 221 N. Y. S. 93, aff'd. 222 App. Div. 713, 224 N. Y. S. 793, aff'd 248 N. Y. 107, 161 N. E. 436.

Whether or not the crew members need to repay to Israel Aircraft any of the workmen's compensation payments received from their employer, is a question which must be answered under Israeli law. Under the terms of the release and accord given to Israel Aircraft by the crew members, the crew members agreed only to hold IAI and the Ministry of Defense harmless from any claims made by any other persons in their name or on their behalf for the same workmen's compensation payments. But a careful reading of paragraph 4 of the deed and accord will show that the defendants in this case are not counter-claiming against Israel Aircraft in the crew members' names or on their behalf, nor are they seeking workmen's compensation payments.

Whether or not the workmen's compensation payments paid to the crew members by IAI constitute a lien under Israeli law should be and will be decided by an Israeli court. If the crew members are required to repay that money, then of course they will do so; but again, these questions have nothing whatsoever to do with the instant lawsuit.

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Conclusion

Plaintiff crew members are entitled to collect one hundred percent of their judgment from the defendants in this case. What portion of their recovery, if any, they must repay to Israel Aircraft Industries, Ltd. is a matter of local internal Israeli law which should be and will be decided by a local Israeli court.

Respectfully submitted,

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Norman Leonard Cousins
Of Counsel

Israel Aircraft Industries, Ltd.'s Post-Trial Memorandum of Law, Filed March 26, 1976.

STATEMENT OF FACTS

This is an action for personal injuries and property damages sustained as the result of the crash of a Jet Commander aircraft, Serial No. 029, in Israel on January 21, 1970.

Plaintiff crew members, Zohar Landau, Mordechai Muscatel and Hagai Koren, negotiated settlements with their employer, plaintiff Israel Aircraft Industries, Ltd. on January 1, 1971, March 1, 1971 and July 3, 1970 respectively, for all claims arising out of the crash.

On January 27, 1976 the Jury returned a verdict in favor of all plaintiffs against Standard Precision a Division of Electronic Communications, Inc. Additionally, the Jury concluded that defendant Standard Precision was 35% responsible for the cause of the crash and plaintiff Israel Aircraft Industries, Ltd. was 65% responsible. The Jury verdict as to damages, returned on February 4, 1976, valued the personal injuries at a total of $425,000 and the property damages at $860,000.

POINT I

THE JURY VERDICT AS TO THE VALUE OF THE PROPERTY DAMAGES WAS SUPPORTED BY THE WEIGHT OF THE EVIDENCE

Defendants move this Court for a partial new trial, pursuant to F.R.C.P. 59, on the issue of damages as to plaintiff Israel Aircraft Industries, Ltd., on the grounds that the amount awarded by the Jury for the loss of the aircraft was excessive and that the $860,000 Jury verdict was unsupported by the evidence.

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Defendants' moving papers merely restate their position with regard to the facts, figures, analyses and opinions concerning the valuations which were presented at trial. During the lengthy and contested development of this issue at trial the Jury heard these same arguments, considered them, and, after careful deliberation, rendered its verdict.

Plaintiff Israel Aircraft Industries, Ltd. presented facts and opinion to support its valuation in excess of $1,200,000. Defendants' expert valued the aircraft at approximately $350,000. The Jury verdict was in the middle range of $860,000.

This motion is addressed to the sound discretion of this Court and seeks a final ruling on the issue. The essential duty involved is to ensure that a miscarriage of justice does not result from entering judgment on the Jury's verdict. *Magee v. General Motors Corp.*, 213 F. 2d 899 (3rd Cir. 1954).

In their moving papers, defendants present a new method for valuing the aircraft, which does not even conform to their own expert's method. The predictable difference of expert opinion on this issue presented the Jury with alternative dollar amounts to use in its valuation of the aircraft. As the record reflects, each method was substantiated with facts and opinions for determining the fair value of the aircraft. Additionally, the Court properly instructed the Jury that,

> "If you find the existence of a market price for the airplane in this case you should set that price as its value. If you find that there is no market price for the aircraft you must then determine what the fair value of the aircraft was." Trial transcript at p. 2498.

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The Jury followed the Court's instructions and arrived at a reasonable and fair value for the aircraft.

When an award appears to be "shocking" or "monstrous" it may be set aside, and if not set aside, it may justify appellate interference with the action of the trial court. *Krall v. Crouch Brothers, Inc.*, 473 F. 2d 717 (8th Cir. 1973) and *Gallard v. Johnson*, 504 F. 2d 1198 (7th Cir. 1974). In reviewing the lower court decision, a higher court will affirm unless an award is "so excessive that it would be a miscarriage of justice to permit it to stand." *Dagnello v. Long Island Rail Road Company*, 289 F. 2d 797 (2d Cir. 1961). If then, a jury verdict is so high that it would be unconscionable to permit it to stand, it should be set aside or lowered in amount.

It must be noted that the case law cited above involves the valuation of damages in personal injury or wrongful death litigation. In property damage litigation the assessment is almost mechanical because most chattel have readily obtainable fair market values. However, litigation involving loss of an experimental aircraft is somewhat unique. As this Court instructed the Jury, it is a question of fact whether a fair market value exists and, if there is none it is for the Jury to determine the fair value based upon all available evidence.

Defendants suggest that plaintiff's expert "questioned" his own method of valuation on cross examination and "recanted" his direct testimony. This contention does a disservice to the complexity of this case. Aircraft 029 was configured as a prototype aircraft and was a key element in a testing and development program intended to produce a new and advanced entrant into the market. The "questions" posed by plaintiff's expert were in recognition of these realities, and were not doubts or contradictions as defendants imply. The complex valuation procedure used by plaintiff's expert was explained and supported to the

satisfaction of the Jury. Defendant cannot be heard to complain that its "used airplane price" method was rejected by the triers of fact.

The amount of $860,000 was reached after careful deliberation and was supported by the weight of the evidence, and is not excessive as a matter of law or fact so as to prompt judicial interference with findings properly made by the Jury, upon charges fairly given, and information reasonably presented.

POINT II

THE RELEASES EXECUTED BY THE PLAINTIFF CREW MEMBERS PRECLUDE THEIR RECOVERY IN EXCESS OF 35% OF THE DAMAGES AWARDED AT TRIAL

The Releases executed by plaintiffs, Zohar Landau, Mordechai Muscatel and Hagai Koren, preclude them from recovering in excess of 35% of the amounts awarded to them by the Jury at the trial of this action and compel the dismissal of the Counter-Claims of defendants against plaintiff, Israel Aircraft Industries, Ltd.

In consideration for full compensation, plaintiffs, Zohar Landau, Mordechai Muscatel and Hagai Koren, executed releases in favor of plaintiff Israel Aircraft Industries, Ltd. and their claims must now be reduced by the equitable share of the damages which have been apportioned to plaintiff Israel Aircraft Industries, Ltd. Translations of the releases are annexed hereto as Exhibits "A", "B" and "C", respectively.

Although neither the Jury nor this Court have considered defendants' Counter-Claims against plaintiff Israel Aircraft Industries, Ltd., it is essential to raise the releases

at this time. Recovery of 100% of the awarded damages will result in unjust enrichment of the crew members who have settled any and all claims against employer and have received and will continue to receive full and fair compensation for their injuries from Israel Aircraft Industries, Ltd.

The laws of the State of New York and Israel are similar with regard to the reduction of a plaintiff's recoverable damages by the amount of a released tortfeasor's share of the damages.

Prior to the adoption of General Obligations Law, Section 15-108 in 1972, the courts of New York precluded plaintiffs from any recovery against joint tortfeasors when a release was executed in favor of one tortfeasor and the plaintiff failed to specifically reserve his rights against the remaining tortfeasors. *Berlow v. New York State Thruway Authority*, 29 N. Y. 2d 949 (1972).

In September 1974, General Obligations Law, Section 15-108 was amended to provide:

> "(a) Effect of release or of covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but *it reduces the claim of the releasor against the other tortfeasors to the extent* of any amount stipulated by the release or the covenant, paid for it, or in the amount *of the released tortfeasor's equitable share of the damage* under article fourteen of the civil practice law and rules, whichever is the greatest.

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(b) Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.

(c) Waiver of contribution. A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person." [Emphasis added].

The purpose of the 1974 amendment to Section 15-108 was to eliminate the chilling effect which the decision in *Dole v. Dow Chemical Co.*, 30 N. Y. 2d 143, 331 N. Y. S. 2d 382 (1972) had upon settlements. This adverse effect upon settlement was reflected in *Blass v. Hennessey*, 44 A. D. 2d 405, 355 N. Y. S. 2d 506 (1974), where the court permitted a defendant to implead a joint tortfeasor who had settled with the plaintiff. Section 15-108(b) was specifically introduced to protect a settling tortfeasor from further liability by way of contribution. Section 15-108(a) protects the defendant from being required to pay in excess of its share of responsibility for the damages and precludes the plaintiff from obtaining a windfall by way of double recovery.

In the case at bar plaintiff crew members settled with Israel Aircraft Industries, Ltd. shortly after the accident. Thereafter, the Jury at the trial of this action determined Israel Aircraft Industries, Ltd.'s equitable share of the responsibility to be 65%. If plaintiff crew members recover 100% from defendant Standard Precision, they would, in effect, have a total recovery of more than 100% of their damages. If this Court also grants defendants' Counter-Claims, Israel Aircraft Industries, Ltd. would be required to satisfy the crew members' claims twice.

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Therefore the total jury award in the amount of $425,000 must be reduced by 65% which has been determined to be the equitable share of Israel Aircraft Industries, Ltd., the released tortfeasor. This is clearly provided for in General Obligations Law, Section 15-108. The only alternative to this resolution would be a complete bar to recovery based upon the General Obligations Law as it existed prior to 1972 or the law of Israel.

Since this Court has determined that the substantive law of Israel will apply to all negligence causes of action alleged in the Complaint, plaintiff Israel Aircraft Industries, Ltd. has asked Israeli counsel to prepare an analysis of the law of Israel with regard to this issue.

Preliminarily, Dr. David Hermann, who testified at the trial of this action as an expert on Israeli law on behalf of plaintiff Israel Aircraft Industries, Ltd., has reviewed the releases and has concluded that they were properly executed in accordance with the law of Israel. Although Dr. Hermann's analysis has not been completed, it is his view that an Israeli Court would enforce the releases against the crew members.

In the third paragraph of their releases, Messrs. Landau, Muscatel and Koren acknowledged that their settlements with Israel Aircraft Industries, Ltd. were ". . . in complete, final and full satisfaction of all [my] claims and demands in respect of everything resulting from said accident. . ." This clear and unambiguous language is followed by the seventh paragraph in which the crew members waive all claims against Israel Aircraft Industries, Ltd. either directly or indirectly. There can be no doubt that the crew members' recovery must be reduced by Israel Aircraft Industries, Ltd.'s share of the damages.

If this Court were to apply the law of New York to this issue, the only possible conclusion would be that the crew members waived their rights to all recovery against all tortfeasors.

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Prior to the 1972 amendment to the General Obligations Law, Section 15-108, the crew members would have been precluded from recovery against anyone. *Malvica v. Blumenfeld,* 28 N. Y. 2d 851 (1971); *Berlow v. New York State Thruway Authority,* 29 N. Y. 2d 949 (1972); *Oliver v. Washburn,* 46 A. D. 2d 977, 362 N. Y. S. 2d 91 (3rd Dept. 1974).

In *Jordan v. Westhill Central School District,* 42 A. D. 2d 1043 (4th Dept. 1973) the Court concluded that the 1972 amendment to Section 15-108 was not to be construed retrospectively. Therefore, the Court reasoned that ". . . the rule applicable at the time the releases were given was that a release of one tortfeasor without a reservation of rights against joint tortfeasors is a release of the joint tortfeasors as well." 42 A. D. 2d at 1043.

Therefore, the only issue to be resolved is whether an Israeli Court would determine that the crew members reserved their rights to pursue an action against Standard Precision and, therefore, be permitted to recover 35% or whether they waived their rights to all recovery.

CONCLUSION

It is respectfully submitted that defendants' Motion for a New Trial, pursuant to Rule 59 of the Federal Rules of Civil Procedure, should be denied in all respects and that the Court grant plaintiff Israel Aircraft Industries, Ltd.'s Cross-Motion to Dismiss defendants' Counter-Claims

and that this Court grant such other and further relief as may appear just and proper in the circumstances.

Respectfully submitted,

CONDON & FORSYTH
Attorneys for Plaintiff Israel Aircraft Industries, Ltd.
1251 Avenue of the Americas
New York, New York 10020
Tele: (212) 757-6870

Of Counsel:

WILLIAM L. SCHIERBERL
MARSHALL S. TURNER

Exhibit A, Annexed to Post-Trial Memorandum.

K 201/3/1

Deed of Release and Full and Final Accord.

I, the undersigned, Zoher Landau, Identity Card No. 032055, of 12 Tolalim Street, Ramat Gan, employee of the Israel Aircraft Industries Ltd., Personal Number 16242, declare herewith as follows:

Whereas In the accident which occurred on 21.1.70 of Jet Commandor aircraft 4X-COJ, I was injured, damages having been caused to me and a 43 percent permanent disability was determined by the National Insurance Institute.

and Whereas I reached full and final agreement with the Israel Aircraft Industries Ltd. (hereinafter IAI) and the Ministry of Defense who, without admitting responsibility for the said accident or their obligation to do so, agreed to pay me compensation as set forth below, this being in complete, final and full satisfaction of all my claims and demands in respect of everything resulting from the said accident, excluding the disability pension payable to me by the National Insurance Institute (hereinafter the Disability Pension),

Now, therefore, I hereby confirm, declare and undertake as follows:

1. I have received from IAI the amount of IL. 75,000 (Seventy Five Thousand) in complete final and full settlement of all my claims and demands against IAI and/or the Ministry of Defense, in respect of everything, directly or indirectly, connected with or resulting from the accident of the above mentioned aircraft accident (excluding the disability pension of the National Insurance Institute).

2. The amount specified above includes full, final and complete satisfaction of all damages and/or losses of any kind or nature which have been caused to me and/or may be caused to me at any time, both directly and indirectly, as a result of the said accident.

3. In consideration of the receipt of the amount, I herewith waive all my claims and demands and contentions, including waiver of any insurance monies which might be payable to IAI and/or the Ministry of Defense under any policy of insurance or agreement of insurance, in respect of my above mentioned injury and disability, in connection with the damages and/or losses resulting from the said accident and I hereby release IAI and/or the Ministry of Defense and/or anyone of them and/or any other person or legal body in their name and/or in their stead, from any responsibility and/or liability whatsoever in connection with the said accident.

4. I hereby declare and confirm that: neither I nor any person and/or any legal entity in my name and/or in my stead, have and will have, any demands, contentions or claims against IAI and/or the Ministry of Defense and/or any one of them and/or any other person, and/or legal entity in their name and/or in their stead, in respect of the said accident and/or everything connected therewith, and/or resulting therefrom, directly or indirectly including claims under the Law Amending the Civil Torts Law (Reparation for Bodily Damages) 1964, and I undertake to indemnify the recipient of the claim or demand, should a claim be made against him by any person or body for any payment borne by him due to the above accident, up to the amount of IL. 75,000.

Exhibit A, Annexed to Post-Trial Memorandum

5. I confirm and agree that on payment of the amount, no obligation is or will be imposed on IAI to employ me in the future as a pilot, but as an engineer under the terms customary with the IAI in respect of engineers, and that to the extent that IAI will be interested at any time thereafter to employ me as a pilot, and I will be interested therein, the conditions of my employment shall be negotiated and agreed upon separately, taking into account the fact that compensation was paid to me under this deed,

6. It is known to me that IAI agreed to pay to me the amount of IL. 75,000 (Seventy Five Thousand) only based upon my above confirmation and statement.

In witness thereof I put my hand and signature

Date: 20.1.71

(—) ZOHER LANDAU
(—) illegible

I, the undersigned Pinhas Ben Zvi Advocate of IAI, hereby confirm that the above Deed of Release was signed by Mr. Zohar Landau, holder of Indentity Card No. 832055, on 20.1.71, after I read and thoroughly explained to him its contentions and the consequences resulting therefrom.

(—) PINHAS BEN ZVI

Exhibit B, Annexed to Post-Trial Memorandum.

K 201/3/1

Deed of Release and Full and Final Accord.

I, the undersigned, Mordechai Muscatel, holder of Identity Card No. 1042304, of Kfar Vitkin, employee of the Israel Aircraft Industries Ltd., Personal Number 11893, hereby declare as follows:

Whereas In the accident which occurred on 21.1.70 of the Jet Commander aircraft, I was injured, damages having been caused to me and a 5 percent permanent disability was determined by the National Insurance Institute.

and Whereas I reached full and final agreement with the Israel Aircraft Industries Ltd. (hereinafter IAI) and the Ministry of Defense who, without admitting responsibility for the said accident or their obligation to do so, agreed to pay me compensation as set forth below, this being in complete, final and full satisfaction of all my claims and demands in respect of everything resulting from the said accident,

Now, therefore, I hereby confirm, declare and undertake as follows:

1. I have received from IAI the amount of IL. 10,000 (Ten Thousand) in complete final and full settlement of all my claims and demands against IAI and/or the Ministry of Defense, in respect of everything, directly or indirectly, connected with or resulting from the accident of the above mentioned aircraft accident.

2. The amount specified above includes full, final and complete satisfaction of all damages and/or losses of any kind or nature which have been caused to me and/or may be caused to me at any time, both directly and indirectly, as a result of the said accident.

Exhibit B, Annexed to Post-Trial Memorandum

3. In consideration of the receipt of the amount, I herewith waive all my claims and demands and contentions, including waiver of any insurance monies which might be payable to IAI and/or the Ministry of Defense under any policy of insurance or agreement of insurance, in respect of my above mentioned injury and disability, in connection with the damages and/or losses resulting from the said accident and I hereby release IAI and/or the Ministry of Defense and/or anyone of them and/or any other person or legal body in their name and/or in their stead, from any responsibility and/or liability whatsoever in connection with the said accident.

4. I hereby declare and confirm that: neither I nor any person and/or any legal entity in my name and/or in my stead, have and will have any demands, contentions or claims against IAI and/or the Ministry of Defense and/or any one of them and/or any other person, and/or legal entity in their name and/or in their stead, in respect of the said accident and/or everything connected therewith, and/or resulting therefrom, directly or indirectly.

5. I hereby confirm and agree that upon payment of the amount, IAI shall not be obliged and will not be obliged to employ me as a test flight technician, and I hereby agree to work in any other job imposed upon me under the terms customary with IAI in respect to such a job. IAI will continue to pay me each and every month, also in the future, irrespective of the job I will be employed in, a flight supplement in accordance with the grade I shall have at the time, and this as long as I will be in the employ of IAI.

Exhibit B, Annexed to Post-Trial Memorandum

6. It is further agreed that I will be allowed to be occasionally absent myself from my work without salary deduction, for the purpose of making checks and receiving treatment in connection with the accident, provided I shall submit a medical confirmation that the treatment or tests were necessary due to the accident, and provided further that I shall not be allowed to be absent more than 26 days per year.

7. It is known to me that IAI agreed to pay to me the amount of IL. 10,000 (Ten Thousand) only based upon my above confirmation and statement.

In witness whereof I put my hand and signature.

Date: 1.3.71

(—) MORDECHAI MUSCATEL

I, the undersigned, Pinhas Ben Zvi, Advocate of IAI, hereby confirm that the above Deed of Release was signed by Mr. Mordechai Muscatel, holder of Identity Card No. 1042384, on 1.3.74, after I read and thoroughly explained to him its contents and the consequences resulting therefrom.

(—) PINHAS BEN ZVI, Adv.

Exhibit C, Annexed to Post-Trial Memorandum.

K 201/3/1

Deed of Release and Full and Final Accord.

I, the undersigned, Hagai Koren, holder of Identity Card No. 929772, of 23 Gordon Street, Ramat Hasharon, employee of the Israel Aircraft Industries Ltd., Personal Number 13678, hereby declare as follows:

Whereas In the accident of the Jet Commander aircraft 4X-COJ which occurred on 21.1.70, I was injured and suffered damages;

and Whereas I reached full and final agreement with IAI, The State of Israel and the Ministry of Defense, for receipt of compensation as set forth below for complete, final and full satisfaction of all my claims and demands in respect of everything connected with and/or resulting from the said accident.

Now, therefore, I hereby confirm, declare and undertake as follows:

1. I have received from IAI the amount of IL. 5,000 (Five Thousand) in complete final and full settlement of all my claims and demands against IAI and/or the Ministry of Defense, and/or the State of Israel, in respect of everything, directly or indirectly, connected with or resulting from the above mentioned aircraft accident.

2. The amount specified above includes full, final and complete satisfaction of all damages and/or losses of any kind or nature which have been caused to me

and/or may be caused to me at any time, both directly and indirectly, as a result of the above said accident.

3. In consideration of the receipt of the above amount I hereby waive all my claims and contentions in respect of damages resulting from the said accident and I hereby release IAI, and any other person or legal body from all liability whatsoever in connection with the said accident.

4. I hereby declare that, except myself, no other person or legal body has got any claim or demand whatsoever in respect of the said accident, and/or everything connected therewith and/or resulting therefrom, including claims under the Law Amending the Civil Tort Law (reparation of bodily damages) 1964, and I undertake to indemnify the recipient of the claim on demand, should any claim be made against him by any person or body, against any payment which will be borne by him pursuant to the said accident.

5. The above agreement was entered into by myself in view of the fact that the Medical Committee of the National Insurance Institute has found only temporary invalidity.

   Should any test to be made by the Medical Committee of the National Insurance Institute establish permanent invalidity and/or invalidity which will entail any type of surgery, I am reserving my right to apply to IAI in order to have renewed negotiations in respect of the amount of compensation.

Exhibit C, Annexed to Post-Trial Memorandum

6. It is known to me that IAI agreed to pay to me the amount of IL. 5,000 (Five Thousand) only based upon my above confirmation and statement.

In witness thereof I put my hand and signature:

(—) HAGAI KOREN

Israel Aircraft Industries, Lod Airport, 3.7.1970.

I, the undersigned, N. Sadeh, Advocate of the Legal Department of Israel Aircraft Industries, Ltd., hereby confirm that the above Deed of Release was signed on the date below by Mr. Hagai Koren, holder of Identity Card Number 929772, and this after I read and thoroughly explained to him its contents and the consequences resulting therefrom.

(—) N. SADEH, Advocate

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POINT I

PLAINTIFF ZOHAR LANDAU, MORDECHAI MUSCATEL AND HAGAI KOREN EXECUTED GENERAL RELEASES FOLLOWING THIS ACCIDENT WHICH RELEASED ALL TORTFEASORS AND THEREFORE JUDGMENT SHOULD BE ENTERED IN FAVOR OF STANDARD PRECISION

Date of Koren's General Release: July 3, 1970
Date of Landau's General Release: January 20, 1971
Date of Muscatel's General Release: March 1, 1971
(Exhibits A, B & C)

Pertinent portions of these Releases, entitled "Deed of Release and Full and Final Accord," are set forth below: in the third paragraph of their General Releases Messrs. Landau, Muscatel and Koren acknowledge that the monetary compensation received from their employer IAI was

> "* * * in *complete, final* and *full satisfaction* of *all my claims* and demands in respect of *everything* resulting from said accident * * *." (Emphasis added)

The fifth paragraph says:

> "The amount specified above includes *full, final* and *complete satisfaction* of all damages and/or losses of *any kind* or *nature* which have been caused to me and/or may be caused to me at *any time both directly, and indirectly,* as a result of the above said accident." (Emphasis added)

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The concluding paragraphs of the Releases, set forth below, were added and signed by IAI attorneys to ensure that the plaintiffs fully understood the releases.

> "I, the undersigned Pinhas Ben Zvi, Advocate of IAI, hereby confirm that the above Deed of Release was signed by Mr. Zohar Landau, holder of Identity Card No. 032355, on 20.1.71, after I read and thoroughly explained to him its contents and the consequences resulting therefrom."
>
> PINHAS BEN ZVI

> "I, the undersigned, Pinhas Ben Zvi, Advocate of IAI, hereby confirm that the above Deed of Release was signed by Mr. Mordechai Muscatel, holder of Identity Card No. 1042384, on 1.3.74, after I read and thoroughly explained to him its contents and the consequences resulting therefrom."
>
> PINHAS BEN ZVI

> "I, the undersigned, N. Sadeh, Advocate of the Legal Department of Israel Aircraft Industries, Ltd., hereby confirm that the above Deed of Release was signed on the date below by Mr. Hagai Koren, holder of Identity Card Number 929772, and this after I read and thoroughly explained to him its contents and the consequences resulting therefrom."
>
> N. SADEH, Advocate

Plaintiffs Landau and Koren have graduated from U. S. Universities with engineering degrees. It cannot be said that they lacked the minimal intelligence required to comprehend the significance and consequences of signing these Releases after being fully apprised thereof by IAI attorneys.

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The explicit, unequivocal and unambiguous language of these General Releases leaves no doubt that the plaintiffs accepted payments from IAI totalling 90,000 Israeli pounds in full and final settlement of all their claims arising from this accident. There are no reservation of rights clauses regarding any defendant and particularly no reservation of rights against Standard Precision.

The legal effect of these General Releases must be construed according to Israeli substantive law.

Mr. Cousins on behalf of the crew members would have us believe that these Releases were nothing more than workman's compensation agreements between IAI and its employees. This is certainly not the case and Mr. Cousins knows or should know that there is no workman's compensation, as such, in Israel. An employee in Israel has a right to sue his employer for negligence. There is no "exclusive remedy" of workman's compensation payments. Employees who are injured on the job in Israel often file claims against their employers. As in the case of Landau, Muscatel and Koren, the claims are usually settled resulting in Releases being executed.

Defendant Standard Precision has obtained an affidavit from counsel in Israel regarding the effect of these Releases under Israeli law. Mr. Y. Beinisch, a practicing trial attorney in Israel, has set forth his opinion after carefully examining the Releases, annexed as exhibit D.

The following paragraphs from Mr. Beinisch's affidavit are of particular significance:

> "2. I have been requested to furnish my opinion on deeds of release and full and final accord signed by the claimants Zohar Landau, Mordechai Muscatel and Hagai Koren, photostatic copies whereof are attached to this affidavit, marked 'A', and which, I have been informed, came to the knowledge of

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the defendant after judgment had been given in the case between the claimants and the defendant."

"4. With regard to the above deeds of release and full and final accord, there is no doubt that by signing them the claimants waived all and any claims of any kind against any body for the accident on January 21, 1970, except for the benefits received and to be received from the National Insurance Institute."

"5. I have examined both the original of the deeds of release and full and final accord, signed in Hebrew, and their English translation, and it is quite clear that by signing these documents, whose contents were read and explained to the claimants by a lawyer, who also explained their significance, the claimants waived all claims against any tort-feasor, in addition to the Israel Aircraft Industries (I.A.I.)."

"6. The above deeds also state that the payment made was made in full and final settlement of all the claimants' demands and claims arising out of the said accident and that this sum covers all the damages and losses suffered by them as a result of the accident."

"7. Furthermore, the Israel Supreme Court held in 1957, in C. A. 344/56, that the fact that an employee received compensation for damages from his employer is sufficient to bar a claim for damages from a third party. A photostatic copy of this judgment is attached hereto and marked 'C'."

"11. Even in the event that the deeds of release and full and final accord did not estop the claim-

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ant from issuing summons, the claimants were bound to disclose to the defendant the existence of these deeds of release and full and final accord and the fact that they had signed such documents, and to deduct the sums received from the summons.

However, in the present case, the deeds of release and full and final accord signed by the claimants undoubtedly estop them from making claims on any person or body, whether in Israel or anywhere else in the world, consequent on the accident in which they were involved on January 21, 1970.?

"12. In my opinion, the claimants Koren, Landau and Muscatel may not issue summons against any other tortfeasor after receiving compensation from the Israel Aircraft Industries for damages as a result of the accident in which they were involved while in the employ of the Israel Aircraft Industries."

POINT II

DEFENDANTS THROUGH DISCOVERY PROCEEDINGS ENDEAVORED TO OBTAIN ALL RECORDS PERTAINING TO LANDAU, MUSCATEL AND KOREN WHICH INCLUDED THESE EXECUTED GENERAL RELEASES

Defendants' Notice for Production of Documents dated July 5, 1973, item number 11 (Exhibit E) requested:

"11. *All personnel records* of the individual plaintiffs which are in the possession or control of Israel Aircraft Industries, Ltd., *including but not limited to* payroll, medical, hiring, training, and

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> work of the individual plaintiffs as employees of said Israel Aircraft Industries, Ltd." (Emphasis added)

A document marking session was held at the offices of Condon & Forsyth on January 10, 1974 for the purpose of producing and marking documents called for in the Notices for Production of Documents served by both parties. A transcript of this session was made and of particular interest are pages 120 lines 23-25 and 121 lines 1-5 (Exhibits F, F-1 & F-2). These pages contain the following:

> (page 120, lines 23-25) "Mr. Fitzsimons: Do you have anything at all to produce with respect to item No. 11 calling for the personnel records of the individual plaintiffs?"
>
> (page 121, lines 3-5)
>
> "Mr. Schierberl: Not at this time. We are obtaining those records and as soon as we have them I will give them to you."

Despite Mr. Schierberl's above statement that plaintiffs personnel records would be given to defendants, this request was never fully complied with. The language of defendants' Notice for Production of Documents clearly stated: "All personnel records, and further added: "* * * including but not limited to payroll, medical, hiring, training and work of the individual plaintiffs * * *." At the time this Notice for Production of Documents was served (July 5, 1973), the General Releases executed by the plaintiffs had long been in the possession of the plaintiffs and a part of IAI's records pertaining to Landau, Muscatel and Koren. (Releases were executed in 1970 and 1971) IAI, Landau, Muscatel and Koren were legally obligated to produce the General Releases pursuant to FRCP Rule

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34 and, as we now know, they were not produced until after the trial. (March 26, 1976). Condon & Forsyth at that time represented both the employer IAI as well as the individual plaintiffs and had a duty to insure compliance with defendants' Notice to Produce. Condon & Forsyth knew that the plaintiffs had received lump sum payments from IAI totalling 90,000 Israeli pounds. They had a duty to ascertain the true nature of these payments and to obtain the General Releases which were retained in the IAI personnel records and which were in the possession of Landau, Muscatel and Koren.

Fuchsberg & Fuchsberg, who later substituted as attorneys for the crew members, also had a duty to inquire into the conditions preceding the lump sum payments by IAI. The signing of the Releases by clients is a fundamental issue that should be raised by attorneys prior to the signing of retainer agreements.

When Fuchsberg & Fuchsberg assumed the defense of the individual plaintiffs they received a copy of the entire file from Condon & Forsyth. Included in the file were the defendants' Notices to Produce. These Notices to Produce were directed to all plaintiffs, not just IAI. Fuchsberg & Fuchsberg had a duty to insure that the items in the Notices to Produce pertaining to their clients were fully complied with. Fuchsberg & Fuchsberg failed to obtain copies of the General Releases and serve them on the attorneys for defendants in compliance with item 11 of the Notices to Produce. (Exhibit E).

During depositions, the plaintiffs acknowledged receipt of lump sum payments pursuant to an "agreement" with IAI. (page 40, lines 8-21, deposition of Muscatel, July 24, 1974, Exhibit G).

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> "Q. Can you tell us what the 10,000 pounds lump sum payment you received from IAI represented? A. I think there was an agreement between me and IAI to get that sum of money because of what happened to me.
>
> Q. Does the sum of money have some relationship to—let me withdraw that.
>
> Was this money paid to you as a result of your injuries sustained in this accident? A. Yes.
>
> Q. Pursuant to the agreement between yourself and IAI, this money must be repaid to them out of any you might get as a result of this lawsuit? A. Yes."

The General Releases contain no language or reference to reimbursing IAI from any future recoveries from other parties, yet Muscatel answered unequivocally "yes", above (line 21, Exhibit G), when asked if pursuant to the agreement (Release) with IAI he had to repay IAI from any recovery from the present lawsuit; his answer was untrue and misleading. Muscatel, Landau and Koren, had a duty, in response to questions concerning their agreements with IAI, to reveal that they had, in fact, filed claims against IAI and executed Deeds of Release in exchange for IAI's payments; at that point in the depositions, plaintiffs, through their attorney Mr. Cousins, should have produced copies of the Releases.

Some documents were produced which related to the individual plaintiffs. (Exhibits H, H-1, H-2, H-3, H-4 & H-5). These documents made no reference to the General Releases.

Questions 12 & 13 (Exhibit H) asked:

> "12. Details of any injury payments made by IAI.

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> 13. Whether or not any of the above mentioned payments are taken into account and deducted from damages under Israeli law."

Muscatel's responses (Exhibits H-1 & H-2) to questions 12 & 13 are as follows:

> "12. Payment made by IAI IL 10,000
>
> 13. * * * Payment per para. 12 is not a question of law since it was an *ex-gratia grant;* it was now agreed that in case Mr. Muscatel's action is successful, he will refund this grant out of the proceeds." (Emphasis added).

Laudau's responses (Exhibits H-3 & H-4) to questions 12 & 13 are as follows:

> "12. Injury payment and reparations for loss of future income of the amount of IL 75,000 were made by IAI.
>
> 13. * * * The payment made by IAI is not a subject to law as it was an *ex-gratia payment;* it was agreed that in case the present action succeeds, it will be refunded to IAI out of the proceeds." (Emphasis added).

Now that we have the General Releases before us, it is clear that the payments made by IAI pursuant to these Releases of 75,000, 10,000 and 5,000 Israeli pounds to Landau, Muscatel and Koren respectively, were *not* ex-gratia or gratuitous payments as stated in the documents cited above. These payments by IAI were made after claims were filed against IAI and in exchange for the crew members' agreements to:

> "* * * waive all my claims and demands * * * in connection with the damages and/or losses resulting from the said accident * * * and I hereby re-

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> lease IAI * * * from any responsibility and/or liability whatsoever in connection with the said accident." (para. six of releases (Exhibits A, B & C).

Not only did IAI fail to fully comply with defendants' Notice to Produce, they intentionally mislead defendants as to the true nature of the payments to the crew members. The terms "ex-gratia", or gratuitous, clearly indicate that IAI derived no benefit from these payments when in fact they constituted full settlements of the individuals' claims against their employer IAI.

It is also interesting to note that the Releases contain no language or references to the effect that the individual plaintiffs must pay back or reimburse IAI from any future recoveries against other parties.

Had defendants' Notice for Production of Documents been faithfully complied with by not only IAI, but also by the individual plaintiffs and by Fuchsberg & Fuchsberg, these General Releases would have been produced and defendants would have moved to dismiss plaintiffs' Complaint long before trial; had the Releases been produced as required by law a tremendous expenditure of time and money by defendants' attorneys and this Court would have been obviated. IAI's failure and the individual plaintiffs' failure to produce these General Releases constitutes a fraud on the defendants and upon this Court.

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POINT III

PLAINTIFF IAI VIOLATED FRCP RULES 12 AND 8 BY FAILING TO PLEAD THE AFFIRMATIVE DEFENSE OF RELEASE IN RESPONSE TO DEFENDANTS' COUNTER-CLAIMS

FRCP Rule 12 requires that every defense to a Counter-Claim must be asserted in the responsive pleading. Rule 12(b) reads as follows:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required * * *."

FRCP Rule 8(c) requires that the Affirmative Defense of a *Release* must be set forth in a responsive pleading. This includes Affirmative Defenses to Counter-Claims. Rule 8(c) reads as follows:

> "Affirmative Defenses. In pleading to a. preceding pleading, a party shall set forth affirmatively *accord and satisfaction,* arbitration and award, assumption or risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, *payment, release, res judicata,* statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

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In response to plaintiffs' Amended Complaint, defendants in their Answers interposed Counter-Claims against IAI for indemnification in the event that the individual plaintiffs recovered against the defendants. These Counter-Claims were the basis for the apportionment of liability at trial. The Counter-Claims read as follows: (Exhibit I)

> "As and for a first, separate, counterclaim against Israel Aircraft Industries, Inc.
>
> 14. This defendant specifically denies any defect or unsafe condition in the products as manufactured or sold by it, and specifically denies that such products, at the time of their manufacture and sale, were not fit for the purposes intended; however, if any such product was defective, unsafe or unfit for its intended use on the date of the accident, such condition was caused by the wrongful acts of Israel Aircraft Industries, Inc., and this defendant is therefore entitled to indemnified by, and have contribution from, said Israel Aircraft Industries, Inc."

IAI answered defendants' Counter-Claims on July 24, 1973 by simply denying the allegations of the Counter-Claims (Exhibit J), however, the Affirmative Defense of a *Release* was not pleaded in violation of FRCP Rules 12 and 8 cited above. IAI had knowledge of these *Releases* since March of 1971 and their failure to divulge the existence of these Releases constitutes a fraud on the defendants and upon this Court.

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POINT IV

PLAINTIFF IAI'S MOTION FOR SUMMARY JUDGMENT DISMISSING DEFENDANT'S COUNTER-CLAIMS SHOULD BE DENIED

FRCP Rules 12 and 8 cited in this Memorandum of Law require that the Affirmative Defense of a Release be pleaded in response to a Counter-Claim. As stated previously in this Memorandum of Law, Standard Precision interposed a Counter-Claim with its Answer. IAI answered the Counter-Claim on July 24, 1973 (Exhibit J) by denying the allegations. IAI did not plead the Affirmative Defense of Release in violation of the FRCP.

Having violated the FRCP by not pleading the Affirmative Defense of Release, IAI now moves for Summary Judgment dismissing the Counter-Claims. To simply say that IAI's instant motion is untimely is a gross understatement. IAI had full knowledge of these General Releases and failed to divulge their existence to defendants during discovery proceedings. A motion by IAI to dismiss defendants' Counter-Claims based upon the General Releases would have been appropriate on July 24, 1973 when they replied to the Counter-Claims. Now that IAI has been found by the jury to have been 65% responsible for the crew members injuries, IAI demands judgment dismissing the Counter-Claims based on the Releases.

To grant IAI's motion at this stage of the proceedings would be patently unconscionable and would in effect be condoning and rewarding IAI's clear violation of the Federal Rules of Civil Procedure.

Defendants' Memorandum of Law in Support of Motion to Amend Answer and for Summary Judgment, Filed April 21, 1976

POINT V

DEFENDANT STANDARD PRECISION SHOULD BE PERMITTED PURSUANT TO FRCP RULE 15 (D) TO AMEND ITS ANSWER TO PLAINTIFFS AMENDED COMPLAINT TO INCLUDE THE AFFIRMATIVE DEFENSE OF RELEASE

FRCP Rule 15(d) reads as follows:

> "Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented * * *."

In view of the fact that defendants saw copies of the General Releases for the first time on March 26, 1976, Standard Precision should be permitted to amend its Answer to include the Affirmative Defense of Release.

CONCLUSION

It is respectfully submitted that a fraud has been perpetrated upon the defendants and upon this Court in that General Releases were executed by Landau, Muscatel and Koren and withheld from defendants despite efforts to discover such documents and as a consequence, judgment should be entered in favor of Standard Precision.

Respectfully submitted,

MENDES & MOUNT
Attorneys for Defendants

DENNIS C. MURPHY
JAMES P. DONOVAN
Of Counsel

Israel Aircraft Industries, Ltd.'s Reply Memorandum of Law in Support of Motion for Summary Judgment.

SUMMARY OF ARGUMENT

POINT I

Plaintiff Israel Aircraft Industries, Ltd.'s Motion for Summary Judgment to Dismiss the counter-claims has been timely raised pursuant to Rule 15(a) and Rule 15(b) of the Federal Rules of Civil Procedure which provides for the amendment of pleadings by any party at any time and that the pleadings shall be freely amended to conform to the evidence. The Releases upon which this motion is based are complete defenses to the counter-claims of defendant Standard Precision since the counter-claims have not been determined by this Court and judgment has not been entered, no party will be prejudiced by the Court's consideration of the Releases at this time.

Further, the Releases have been raised as defenses by defendants in support of their Cross-Motion for Summary Judgment against plaintiffs Landau, Muscatel and Koren and precisely the same issues as are involved in this Motion must be resolved by this Court in determining defendants' Cross-Motion.

POINT II

The Releases executed by plaintiffs, Landau, Muscatel and Koren, preclude them from recovering in excess of 35% of the amounts awarded to them by the Jury at the trial of this action and compel the dismissal of the counter-claims of defendants against plaintiff Israel Aircraft Industries, Ltd.

The Civil Wrongs Ordinance of Israel (Civil Wrongs Ordinance—New Version) clearly permits employees to claim against their employers for injuries incurred in the course of their employment. Plaintiff Israel Aircraft Industries, Ltd. negotiated and settled such claims

with the plaintiff crew members. The settlements resulted in Releases which, under both the law of Israel and the law of New York, preclude the crew members from recovery of that portion of damages determined by the Jury at the trial of this action to be attributable to plaintiff Israel Aircraft Industries, Ltd.

POINT I

ISRAEL AIRCRAFT INDUSTRIES, LTD.'S MOTION FOR SUMMARY JUDGMENT TO DISMISS THE COUNTER-CLAIMS HAS BEEN TIMELY RAISED

The Releases executed by plaintiffs Zohar Landau, Mordechai Muscatel and Hagai Koren constitute affirmative defenses, which, pursuant to Rule 8 of the Federal Rules of Civil Procedure, "* * * shall [be] set forth affirmatively." In its reply to defendants' counter-claims, plaintiff Israel Aircraft Industries, Ltd. interposed a general denial and did not raise the Releases as affirmative defenses. Rule 12 provides that affirmative defenses "* * * shall be asserted in the responsive pleading * * *."

A fundamental difference between the law of Israel and that of the United States did not become relevant until the trial had been concluded. All parties were aware prior to trial that the crew had received compensation for their injuries under the law of Israel. However, it was not understood that these payments were from two sources, (1) a payment by the National Insurance Institute of the State of Israel and, (2) a direct payment by Israel Aircraft Industries, Ltd. in settlement of the right of action which, under the law of Israel, an employee has against its employer for injuries sustained in the course of employment. *See* Exhibit "D", Dr. Hermann Memorandum, at 6-8.

Israel Aircraft Industries, Ltd.'s Reply Memorandum of Law in Support of Motion for Summary Judgment

Since this difference was not recognized, the payments made in Israel were regarded as the equivalent of Workmen's Compensation benefits in the United States and treated accordingly. Consequently, the legal effect of the General Releases was not considered until after the trial. However, Rule 15(a) of the Federal Rules of Civil Procedure is broad enough to allow amendment, at this time, for plaintiff Israel Aircraft Industries, Ltd. to assert the General Releases as a specific defense to the defendants' counter-claim. Rule 15(a) clearly provides that leave of court to amend pleadings "* * * shall be freely given when justice so requires". Additionally, Rule 15(b) provides for "[S]uch amendment of pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment * * *."

The objective of Rule 15 is to allow the pleadings to be freely amended to facilitate a proper disposition of litigation on the merits. *Conley v. Gibson,* 355 U. S. 41, 78 S. Ct. 99. 2 L. ed. 2d 80 (1957); *Foman v. Davis,* 371 U. S. 178, 83 S. Ct. 227, 9 L. ed. 2d 222 (1962).

Amendment of pleadings to raise affirmative defenses should also be freely permitted unless undue prejudice is demonstrated by the opposing party. *Deakyne v. Commissions of Lewes,* 416 F. 2d 290 (3rd Cir., 1969); *Harvey v. Eimco,* 32 F.R.D. 598, 7 F. R. Serv. 2d 15a. 212 (E. D. Pa. 1963); *Fischer v. Haskett,* 287 F. Supp. 831 (E. D. Pa. 1968).

It is respectfully submitted that since judgment has not been entered and the counter-claims against Israel Aircraft Industries, Ltd. have not been decided, the Releases should be considered as defenses to the counter-claims and should be reflected in the judgment entered herein.

With this background it is necessary to analyze the Releases and the interpretation given to them at various stages of this litigation by all counsel.

Israel Aircraft Industries, Ltd.'s Reply Memorandum of Law in Support of Motion for Summary Judgment

All plaintiffs were fully aware of the existence of the Releases from the beginning of this lawsuit. Additionally, all defendants were aware that plaintiff Israel Aircraft Industries, Ltd. paid certain sums of money to the crew members and entered into agreements relating to these payments.

It is now clear, as will be further discussed in Point II of this Memorandum, that in addition to the payments received by the crew members from the Israeli National Insurance Institute (which would be comparable to Workmen's Compensation payments under the law of New York), the law of Israel permits employees to make direct claims against their employer. *Civil Wrongs Ordinance (New Version)* Sections 35, 36 and 82. Such claims in tort were made by the crew members and resulted in settlements. The settlement payments were in consideration for Releases, executed by Zohar Landau, Mordechai Muscatel and Hagai Koren as "* * * complete, final and full satisfaction of all my claims and demands in respect of everything resulting from said accident * * *." *See* Exhibits "A", "B" and "C". The resulting Releases were equivalent to General Releases which would be executed in favor of a settling tortfeasor prior to the commencement of litigation under New York law.

Inasmuch as the counter-claim by defendants against plaintiff Israel Aircraft Industries, Ltd. has not been considered nor determined by this Court, leave to raise the Releases as affirmative defenses should be freely given at this time. The Releases involved are quite different from releases in the typical proceeding under the laws of the various States of the United States where Workmen's Compensation is the exclusive remedy for an employee injured in the course of his employment. The memorandum on behalf of the plaintiff crew members in opposition to the Motion for Summary Judgment of plaintiff Israel Aircraft Industries, Ltd. fails to meet this

issue. Additionally, counsel for the crew members has implied that Israel Aircraft Industries, Ltd. has had some malevolent motive for not disclosing the Releases at an earlier time and that the crew members have been prejudiced by this failure to disclose. This position is untenable. Plaintiff Israel Aircraft Industries, Ltd. had nothing to gain and everything to lose by concealing Releases which are a complete defense to defendants' counter-claims. The only reason the Releases were not raised earlier was that U. S. counsel for Israel Aircraft Industries, Ltd. and, apparently counsel for the crew members as well as defense counsel, were unaware of the fundamental difference between the law of Israel and the law of New York, which permits direct actions by employees against their employers.

Further, Zohar Landau, Mordechai Muscatel and Hagai Koren cannot be said to be prejudiced by this failure to disclose because they were parties to the agreements and were fully aware that there was a distinction between the payments that they were receiving from the National Insurance Institute and the payments they received from their employer in settlement of their negligence claims.

It is now implied by defendants that the plaintiff Israel Aircraft Industries, Ltd. deliberately failed to disclose the existence of the General Releases. The fact is that, on their depositions, both plaintiffs Zohar Landau and Mordechai Muscatel acknowledged that payments were made to them by their employer. Further, these plaintiffs specifically testified that agreements relating to these payments were signed.

Now that the applicable law of Israel is before the Court through the memoranda of Israeli counsel for both plaintiff Israel Aircraft Industries, Ltd. and defendants, this Court has sufficient basis upon which to determine the effect of the Releases. Moreover, determination of this issue at this point is timely inasmuch as judgment

has not been entered, the counter-claims of defendants have not been decided, and the question involved is purely one of law.

It is respectfully submitted that the interests of justice require that the Releases be given full force and effect. There can be no prejudice nor undue hardship to the plaintiff crew members who have at all times known of the nature of the General Releases.

POINT II

THE RELEASES EXECUTED BY THE PLAINTIFF CREW MEMBERS PRECLUDE THEIR RECOVERY IN EXCESS OF 35% OF THE DAMAGES AWARDED AT TRIAL

The Releases executed by plaintiffs, Zohar Landau, Mordechai Muscatel and Hagai Koren, preclude them from recovering in excess of 35% of the amounts awarded to them by the Jury at the trial of this action and compel the dismissal of the counter-claims of defendants against plaintiff, Israel Aircraft Industries, Ltd.

In their Memorandum of Law in opposition to this Motion, the crew members vigorously argue that their right to pursue direct actions against defendants is permitted under the negligence law of Israel and New York. Neither defendants nor plaintiff, Israel Aircraft Industries, Ltd., have disputed this. However, the crew members have failed to consider the effect of the Releases upon the amounts they are permitted to recover. Apparently, counsel for the crew members is still laboring under the same misinterpretation of the law of Israel and the effect of the Releases that counsel for Israel Aircraft Industries, Ltd. and counsel for defendants have now realized is incorrect.

Accordingly, the entire memorandum of law of plaintiff crew members, including their analogies between this

case and traditional New York Workmen's Compensation cases, is not applicable to the case at bar. The crew members would only be correct if Israel Aircraft Industries, Ltd. were relying upon releases arising out of settlements between the crew members and the Israeli National Insurance Institute, which is similar to New York's Workmen's Compensation program. However, there is no longer any doubt that the Releases upon which plaintiff, Israel Aircraft Industries, Ltd., relies are entirely different from National Insurance Institute and Workmen's Compensation releases.

Sections 35 and 82 of the Civil Wrongs Ordinance (New Version) of Israel provide that in addition to recovery from the National Insurance Institute, employees have the right to pursue direct actions in tort against their employers. In this case plaintiffs received and continue to receive payments from the National Insurance Institute. In addition they negotiated and arrived at settlements with their employer for all claims arising out of the accident ". . . including claims under *The Law Amending the Civil Torts Law (Reparation for Bodily Damages) 1964 . . ." Exhibits "A" and "C", paragraph 4.

In consideration for agreed upon settlements, each crew member executed a "Deed of Release and Full and Final Accord," copies of which are annexed hereto as Exhibits "A", "B" and "C" respectively. The Releases state, in clear and unambiguous terms, that the settlements were in ". . . complete, final and full satisfaction of all my claims and demands in respect of everything resulting from the said accident, excluding the disability pension payable to me by the National Insurance Institute."

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*The Law Amending the Civil Torts Law (Reparations for Bodily Damages) 1964 has, at various times been translated and referred to by all parties as The Civil Wrongs Ordinance (New Version).

Israel Aircraft Industries, Ltd.'s Reply Memorandum of Law in Support of Motion for Summary Judgment

The effect of such Releases under both the law of New York and the law of Israel can be divided into two categories. Prior to 1973 the Releases would have precluded the crew members from any further recovery and after 1973 the Releases would necessitate the reduction of the recovery by the share of the damages attributable to Israel Aircraft Industries, Ltd.

Prior to the adoption of the General Obligations Law, §15-108 in 1972 there was no doubt that these Releases would have released all tortfeasors under the law of New York. *Malvica v. Blumfeld*, 28 N. Y. 2d 851 (1971); *Berlow v. New York State Thruway Authority*, 29 N. Y. 2d 949 (1972); *Oliver v. Washburn*, 46 A. D. 2d 977, 362 N. Y. S. 2d 91 (3rd Dept. 1974).

As stated by Dr. Hermann in his Memorandum annexed hereto as Exhibit "D", the same result would probably obtain under the law of Israel as it existed prior to the adoption of the Law of Contracts (General Part) in 1973. *See* Exhibit "D", Dr. Hermann Memorandum, at 10-17. *See also, Israel v. Stoller*, a translation of which is annexed hereto as Exhibit "E".

If the current law of Israel and New York were applied, the amount of plaintiffs' claims would be reduced by the released tortfeasor's (Israel Aircraft Industries, Ltd.'s) equitable share of the damages.

The 1974 amendment to the General Obligations Law, §15-108 provides:

> (a) *Effect of release or of covenant not to sue tortfeasors.* When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but *it reduces the claim of the releasor against the other*

> *tortfeasors to the extent* of any amount stipulated by the release or the covenant, paid for it, or in the amount *of the released tortfeasor's equitable share of the damages* under article fourteen of the civil practice law and rules, whichever is the greatest.
>
> (b) Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.
>
> (c) Waiver of contribution. A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person. [Emphasis added].

Thus a New York court would reduce the crew members' recovery by 65%, the equitable share of the damages attributable to the released tortfeasor. This is precisely the same change which occurred in Israel with the adoption in 1973 of Article 55(c) of the Law of Contracts (General Part) which provides:

> Where the creditor released one of the debtors from his debt, in whole or in part, by waiver, release, compromise or any other manner, the other debtor shall also be relieved *to the same extent* except if contrary intention can be gathered from the document of release. Exhibit "D", Dr. Hermann Memorandum at 9.

Accordingly, the law of Israel and the law of New York are identical with regard to the effect of the Releases in this case. That is, if one is to assume that the law as it existed prior to 1973 is applicable, Plaintiffs Zohar Landau, Mordechai Muscatel and Hagai Koren are precluded from all recovery. On the other hand, if the current laws

of Israel and New York are applied, the recovery must be reduced by 65% which is the share of the damages apportioned to the released tortfeasor, Israel Aircraft Industries, Ltd.

The only consideration which plaintiff crew members gave to the effect of the Releases is contained on Page 12 of their opposing Memorandum of Law where they made the unsupported statement that "[A] settlement, a release, an accord and satisfaction, do not under the Israeli law bar or in any way effect the plaintiff's rights to proceed to judgment and collect the full amount thereof from a second negligent defendant." This is simply incorrect. Section 77(a) of the Civil Wrongs Ordinance (New Version) provides:

> Subject to the provisions of sections 83 to 85, no person who has recovered compensation or other relief in respect of any civil wrong, nor any person claiming through or under such person, shall recover any further compensation in respect of such civil wrong.

Nothing in Sections 83 to 85 permits injured parties to settle with one joint tortfeasor and then proceed to obtain full recovery against another tortfeasor. Section 83 allows plaintiffs to sue a second joint tortfeasor if they have been unable to collect their judgment against the first joint tortfeasor. As pointed out in their Memorandum of Law, this section is inapplicable to the crew members in this case. Section 84 provides for indemnity among joint tortfeasors and Section 85 is irrelevant to this case. Therefore, Section 77(a) clearly precludes a plaintiff from recovering twice for the same injuries. Although plaintiff crew members might contend that the Releases were given for different injuries or in respect of different negligent acts than those involved in this lawsuit, the language of the Releases is unambiguous and conclusive in this regard.

Plaintiffs might also contend that they were not fully compensated by the settling joint tortfeasor. Under the current law of Israel, Article 55(c) of the Law of Contracts (General Part), an injured party, who has settled with a joint tortfeasor, is permitted to seek additional recovery against a non-settling joint tortfeasor. However, Article 55(c) requires that the recovery against a non-settling joint tortfeasor be reduced by the extent of the settling tortfeasor's responsibility. *See* Exhibit "D", Dr. Hermann Memorandum, at 18-23c. This is the same result which would obtain under the current law of New York.

These Rules are the result of carefully reasoned judicial and legislative development. As such, their application to the facts of this case will insure an equitable and just result.

CONCLUSION

It is respectfully submitted that plaintiff Israel Aircraft Industries, Ltd.'s Motion for Summary Judgment dismissing defendants' counter-claims should be granted in all respects and that this Court grant such other and further relief as may appear just and proper in the circumstances.

Respectfully submitted,

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Landau, Muscatel and Koren's Memorandum of Law in Opposition to Israel Aircraft's Motion for Summary Judgment and in Opposition to Defendants' Motion to Amend Their Answers and for Summary Judgment, Filed May 3, 1976.

POINT I

ISRAEL AIRCRAFT INDUSTRIES IS ESTOPPED FROM RAISING THE AFFIRMATIVE DEFENSE OF GENERAL RELEASE AT THIS TIME

The crew members (Zohar Landau, Mordechai Muscatel and Hagai Koren) agree with Point IV of the defendants' Memorandum of Law in opposition to IAI's motion for summary judgment.

Aside from failing to plead the affirmative defense of payment and release as required by the Federal Rules of Civil Procedure, Israel Aircraft, during the discovery phase of this litigation, in response to specific written questions posed by the defendants stated, in writing, in regard to Mordechai Muscatel as follows: (Exhibits H and H-1) appended to defendants' moving papers herein.

12. Details of any injury payments made by IAI. Answer: IL 10,000.

13. Whether or not any of the above mentioned payments are taken into account and deducted from damages under Israeli law. Answer: payment per par. 12 is not a question of law since it was an ex-gratia grant; it was now agreed that in case Mr. Muscatel's action is successful, he will refund this grant out of the proceeds.

In response to the same questions addressed to Israel Aircraft concerning Zohar Landau, Condon & Forsyth who then represented both the crew members and Israel Aircraft stated,

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13. The payment made by IAI is not a subject to law as it was an ex-gratia payment; it was agreed that in case the present action succeeds, it will be refunded to IAI out of the proceeds.

Israel Aircraft and its attorneys, Condon & Forsyth, have represented to this Court and to the defendants throughout this litigation that whatever payments Israel Aircraft made to the crew members as a result of and following their accident of January 21, 1970 were purely gratuitous and subject to reimbursement to Israel Aircraft by the crew members out of the proceeds recovered in their lawsuit against Standard Precision and the other defendants.

Assuming the foregoing to be true, Israel Aircraft had a tremendous incentive to see their injured employees recover from Standard Precision: out of the proceeds recovered by the crew members from Standard Precision, Israel Aircraft would be repaid whatever compensation payments they made to the injured employees. Having now been awarded a disappointing blow by the jury's verdict which found Israel Aircraft sixty-five percent responsible for the crash of 029, Israel Aircraft is seeking to turn an acknowledgment of an ex-gratia payment into a general release.

It is a general principle of estoppel law that where a party comports itself in a manner which induces justifiable reliance thereon by others to their detriment, the party causing that reliance may not change its position suddenly and unexpectedly to the detriment of those who have relied thereon. In reliance upon Israel Aircraft's conduct, position and statements, this Court permitted a

Landau, Muscatel and Koren's Memorandum of Law in Opposition to Israel Aircraft's Motion for Summary Judgment and in Opposition to Defendants' Motion to Amend Their Answers and for Summary Judgment, Filed May 3, 1976

five week trial to take place under its auspices. In reliance thereon, the defendants went through years of litigation as did the crew members, who retained New York counsel and spent weeks in New York in a costly and protracted trial, never believing for a second that they had given anyone general releases which would bar their right to sue Standard Precision or any of the other defendants in this case. Condon & Forsyth was retained for the crew members by their own employer who aided, abetted and encouraged the crew members in the prosecution of their lawsuit against Standard Precision, *et al.* If the documents signed by the crew members were general releases, then Israel Aircraft is charged with knowing that and perpetrating a fraud upon the Court, the defendants and their own employees. Estoppel is one of the most powerful weapons in a Court's arsenal to prevent injury to innocent persons who have in good faith relied upon another's conduct.

In *Moskol v. Sood*, 404 Fed. Supp. 916, Chief Judge Curtin of the United States District Court for the Western District of New York estopped the defendant from claiming non-compliance with certain statutory notice requirements where the defendant knew the plaintiff was unaware that such requirements had to be complied with and where the prejudice which would be visited upon the plaintiff by permitting the defendant to raise a defense of non-compliance would be catastrophic.

By failing to plead the affirmative defense, of general release required by FRCP 8(c), the Court and litigants in this suit were justified in believing that no general release had been given by the crew members to Israel Aircraft. Where a party, by his delay, visits prejudice upon his adversary, he may not be permitted to perform an act which, if done earlier, might otherwise have been allowed. This

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is the very principle of estoppel and the heart of the decision in *Moskol v. Sood.* (*Moskol* was a diversity case applying New York law.) Similar principles in estoppel under New York law may be found in *American Mutual Insurance Company of Boston v. Klein,* 379 N. Y. 2d 234 and 240; *Application of Eatman,* 376 N. Y. 2d 856; and in two New York Court of Appeals decisions, *Allstate Insurance Company v. Gross,* 27 N. Y. 2d 263, 317 N. Y. 2d 309, and *Bender v. New York City Health and Hospitals Corporation,* New York Law Journal, March 3, 1976, Vol. 175, No. 42, P. 1, Col. 6. In *Bender v. New York City Health and Hospitals Corporation,* Judge Wachtler in writing for unanimous court, stated

> We believe that where a governmental subdivision acts or comports itself wrongfully or negligently, in inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice, that subdivision should be estopped from asserting a right or defense which it otherwise could have raised. (See generally Anno: applicability of doctrine of estoppel against government and its governmental agencies, 1 ALR 2d 338; Antieau, Municipal Corporations, Sec. 16A, Point 22; cf. *LaPorto v. Village of Philmont,* N. Y. 2d [decided herewith]) The equitable bar to a defense may arise by virtue of positive acts, or omissions where there is a duty to act. P. 15, Col. 2.

Page 2 of defendants' Memorandum of Law states that, "plaintiffs Landau and Koren have graduated from the U. S. Universities with engineering degrees." Defendants seem to imply that a degree in engineering makes one an expert in law. It should be borne in mind that at the

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time the crew members executed their agreements with their employer, none of them were represented by legal counsel, while Israel Aircraft was and all the crew members were told by Israel Aircraft that these releases would in no way affect their right to recover from the negligent manufacturer. In fact, Israel Aircraft no sooner got these agreements signed by the crew members then IAI turned around and retained legal counsel for both itself and the crew members to sue Standard Precision and the other defendants in this action. The "agreements" signed by the crew members were contracts of adhesion: if the crew members wanted their compensation payments from Israel Aircraft, then they had to sign those agreements. (Maybe Israel Aircraft thought those were general releases, but the crew members didn't.) The first time the undersigned ever learned of any "agreements" allegedly signed by the crew members was about one week before the trial was over. We were not shown the documents but only told that "somewhere, some piece of paper may exist." It wasn't until long after the trial was over and Israel Aircraft was found sixty-five percent responsible for the crash of 029 that it, or its attorneys, Condon & Forsyth, ever produced the "agreements" signed by the crew members.

When Fuchsberg & Fuchsberg was first retained by the crew members about two years ago, none of them made any secret of the fact that they had each received some payments from Israel Aircraft and that they may have to repay that money out of the proceeds of this lawsuit. It was evident from our conversations with them both individually and collectively that none of them had the slightest idea that they had ever executed anything which either was or was purported to be a General Release. It is inconceivable that at the time the crew members executed

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their agreements with IAI, that IAI's attorneys told the crew members that they had just executed general releases totally waiving any and all rights they might have against anyone else but that IAI was nevertheless going to retain Condon & Forsyth for them to go ahead and sue Standard Precision and others here in New York.

I am not for a moment saying or suggesting that Israel Aircraft and its attorneys in Israel and in New York conspired to perpetrate a fraud upon this Court and upon the defendants. What I am saying is that neither Israel Aircraft nor its attorneys ever regarded the agreements executed by the crew members as being general releases. That argument was only concocted for the first time here in New York, after the jury's verdict, by IAI and its attorneys in an effort to escape the consequences of the jury's findings.

Israel Aircraft must be estopped by its conduct for making any claim of general release at this time. It cannot take a general release and then hide it during six years of litigation to see what the result will be and then raise it for the first time because it didn't like what happened. Equity requires clean hands. Israel Aircraft's are too dirty to touch.

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POINT II

THE DEFENDANTS SHOULD NOT BE PERMITTED TO AMEND THEIR ANSWER AT THIS TIME

Point V of the defendants' Memorandum of Law is in support of its motion to amend its answer to include the affirmative defense of release. Rule 15(d) of the Federal Rules of Civil Procedure, upon which defendants rely, concerns itself with, "transactions or occurrences or events which have happened since the date of the pleadings sought to be supplemented."

The "release" signed by Hagai Koren is dated July 3, 1970.

The "release" signed by Zohar Landau is dated January 20, 1971.

The "release" signed by Mordechai Muscatel is dated March 1, 1971.

Defendants' answers to plaintiffs' amended complaint was served upon Condon & Forsyth, the then attorneys for all plaintiffs, on July 5, 1973. Clearly, defendants are not seeking to plead transactions or occurrences or events which have happened since their answer was filed. What they should have done is made a motion for a new trial pursuant to Rule 59 of the FRCP on the grounds of newly discovered evidence. The reason they have not is because they would have to satisfy the Court that the "newly discovered evidence" could not by the exercise of due diligence on their part have been discovered prior to or during the trial. While Israel Aircraft's posture during these post trial motions has been somewhat less than enviable,

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it can be stated without qualification that at no time did Israel Aircraft deliberately mislead the defendants or knowingly or deliberately conceal the existence of any general release.

The only reason the defendants did not learn about the "agreements" between the crew members and Israel Aircraft is because they never made any inquiry. They did not exercise due diligence in conducting their discovery. They have no one to blame but themselves for not learning of the existence of these "releases".

A litigant in Federal Court is entitled to discovery of those items he requests. His adversary is not under any obligation to affirmatively deliver items not specifically requested. In examining defendants' notice for production of documents, which appears as defendants' Exhibit E on their moving papers herein, eleven separately enumerated and specifically itemized requests are made. Nowhere does it request production of any releases, agreements or other documents in writing pertaining to any compensation or personal injury payments made by Israel Aircraft to the crew members. It requested and was entitled to payroll, medical, hiring, training and work records of the individual plaintiffs as employees of Israel Aircraft Industries. The catchall phrase, "including but not limited to" is meaningless. More likely than not, the "agreements" executed by the crew members at the request of their employer were in the legal files of their attorneys and not in the employment records of IAI who had no concern whatsoever with such matters. General releases are not even in the same generic category as payroll, medical, hiring, training and work records. Time and time again such phrases as, "including but not limited to" have

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been stricken in both State and Federal Courts as being too broad as improperly shifting to an adversary a task properly belonging to the inquirer. If the defendants wanted to see any agreements or releases or written documents between the crew members and Israel Aircraft, they should have specifically asked for them. (Parenthetically, it should be stated that defendants' notice for production of documents dated July 5, 1973 was served upon Condon & Forsyth who then represented the crew members, before Fuchsberg & Fuchsberg were retained and neither the undersigned nor his firm had any knowledge whatsoever of what documents were or were not supplied by Israel Aircraft. No request for documents whatsoever was made of the undersigned or his firm by the defendants and neither the undersigned nor his firm had any knowledge whatsoever of any written agreement, document, release or otherwise between the crew members and Israel Aircraft.) We can't very well be asked to produce something we don't even know exists.

At the document marking session which was held at the offices of Condon & Forsyth on January 10, 1974 (Exhibit F on defendants' moving papers herein), Mr. Fitzsimmons, who represented the defendants, said, "Do you have anything at all to produce with respect to Item No. 11 calling for the personnel records of the individual plaintiffs?" to which Mr. Schierberl replied "not at this time. We are obtaining those records and as soon as we have them, I will give them to you." No one from the Fuchsberg firm was present at that session and we have no knowledge whether or not any of those personnel records requested by the defendants were subsequently supplied by Israel Aircraft. If Israel Aircraft did not produce them, the

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burden was upon the defendants, seeking discovery, to move for a court order compelling production thereof. If they were lax in so doing, they have no one to blame but themselves. They did not exercise the due diligence required by FRCP 59 and the cases thereunder.

The undersigned was present at the depositions of all three crew members. Zohar Landau's was held on July 22, 1974. Mordechai Muscatel's was held on July 24, 1974 and Hagai Koren's was held on September 5, 1974. In all three cases, the examinations were conducted by Dennis C. Murphy, Esq. of the firm of Mendes & Mount on behalf of the defendants.

Zohar Landau's deposition comprised 107 pages of testimony. There was not a single question asked by Mr. Murphy that was not answered by the witness. Attached hereto are pages 86, 87, 97, 98 and 99 from the deposition of Zohar Landau. These are the pages of Mr. Landau's deposition in which the defendants covered areas of payments from Israel Aircraft, liens and the circumstances under which those monies were paid. There was no obstruction of defendants' questioning and each answer was fully and honestly answered. Despite the fact that Mr. Landau testified that Israel Aircraft claimed a lien for monies paid to him by it, Mr. Murphy never asked if there was any written agreement or release or other document executed or given by Mr. Landau to Israel Aircraft. The only reason Mr. Murphy did not secure that information is because he never asked it. Defendants are invited to attach a single page of Mr. Landau's deposition where they claim such inquiry was made.

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Attached hereto are pages 35 and 40 of the deposition of Mordechai Muscatel. These pages represent the areas of payments by Israel Aircraft to Mr. Muscatel. On page 35 Mr. Murphy asked, "Is there an agreement with your employer IAI that you must pay them back money they have paid you if you receive money in this lawsuit?" to which Mr. Muscatel answered, "yes". Despite being specifically told by Mr. Muscatel under oath that he had an agreement with Israel Aircraft, Mr. Murphy declined to pursue his line of questioning. He did not ask if the agreement was in writing or if any release had been given or if there is any documentation whatsoever evidencing that agreement. Nor did he follow up with any notice to produce any written agreement or release or document from Mr. Muscatel to Israel Aircraft. Rather than serving a specific notice to produce or obtaining any necessary court orders, defendant shifted their own burden of obtaining discovery to Israel Aircraft by the attempt to include the catch-all phrase in Item 11 of its notice to produce of July 5, 1973, "all personal records of the individual plaintiffs which are in the possession or control of Israel Aircraft Industries, Ltd., including but not limited to . . ." It is a fair statement that the "release" or "agreement" executed by the crew members and given to Israel Aircraft in return for their compensation are not "personnel records" and certainly do not come under the general headings of "payroll, medical, hiring, training and work of the individual plaintiffs as employees of Israel Aircraft."

Defendants claim that Israel Aircraft "mislead" them by IAI's answers to Questions 11, 12 and 13 relating to Zohar Landau and Mordechai Muscatel (Exhibit H to defendants' moving papers herein).

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Question 11 requested, "details of any injury insurance payments under the State scheme (interim and final payments)." Condon & Forsyth's response thereto on behalf of IAI was

> Payments: National Health Institute
>
> (a) Interim payments for temporary disability total IL 1074.—
>
> (b) Final payment for permanent disability—$1,879.50

That statement was both accurate and complete.

Question No. 12 sought "details of any injury payments made by IAI." Israel Aircraft's response thereto was "payment made by IAI IL 10,000.—" That answer was complete and accurate.

Question 13 asked, "whether or not any of the above mentioned payments were taken into account and deducted from damages under Israeli law." IAI's response thereto was

> Payments per Par. 11(b) would be taken into account under Israeli law; payment per Par. 12 is not a question of law since it was an ex-gratia grant; it was now agreed that in case Mr. Muscatel's action is successful, he will refund this grant out of the proceeds.

IAI's statement that the payments they made to the crew members was ex-gratia is absolutely correct. Such payments were not paid pursuant to any judgment or court order nor was there even any litigation or suit. Hence, Israel Aircraft was under no legal compulsion or obligation to make those payments and they were in

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fact ex-gratia payments. There is nothing misleading in any way about that statement. Those facts are absolutely true and correct. Moreover, if defendants wanted to know if any agreements or arrangements under which those payments were made were in writing, they should have specifically asked and requested production of those documents. That they failed to do these things is their own failing and they have nobody to blame but themselves. Nobody mislead the defendants or deceived them in any way. This is exactly why they are not moving for a new trial on the grounds of newly discovered evidence but seeking to circumvent the requirements of FRCP 59 by seeking leave to serve a "supplemental complaint". Inasmuch as the "releases" relied upon by the defendants were executed a number of years *before* defendants' answer was served, they are not occurrences which took place *after* service of the defendants' answer and do not qualify as events entitling a party to serve a supplemental pleading.

Attached hereto are pages 97 through 99 of the deposition of Hagai Koren. These pages cover the total examination by the defendants of payments received by Mr. Koren. As the Court can see, defendants ask no questions whatsoever regarding any agreement between Mr. Koren and Israel Aircraft; nor did defendants ask if there were any documents or written instruments evidencing any agreement or release or repayment. The examination was cursory and superficial and if they did not obtain the information they desired, it was only because they did not ask it. Again, I invite defendants to attach any pages of the crew members' depositions in which an evasive or dishonest answer is given to any question pertaining to payments from IAI or any agreements between the crew members and IAI or any similar item.

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> The purpose of a supplemental pleading is to bring a controversy up to date; to introduce newly-occurring facts enlarging or changing the relief sought in the original complaint. Equity Rule 34, which dealt with supplemental pleadings, provided:
>
> ". . . the Court . . . may permit . . . a supplemental pleading, alleging material facts occurring after his former pleading, *or of which he was ignorant when it was made . . .*" (Italics added)
>
> Rule 15(d) does not provide for supplemental pleading in a situation to which the matter in italics refers (hereinabove underlined). Subdivision (d) has limited supplemental pleading to its true office: the presentation of subsequent matter related to the claim or defense presented in the original pleading. 3 Moore's Federal Practice Sec. 15.16

At best, defendants can claim that they were ignorant of the "releases" when they served their answer. That ignorance, however, is not a basis for the service of a supplemental pleading under FRCP 15(d).

In essence, defendants are complaining because plaintiffs never volunteered to produce a "General Release" which the defendants never asked for or inquired about and which the crew members never executed. The crew members testified fully and honestly at their depositions that they received monies from IAI pursuant to an agreement and that they were informed by IAI that the money had to be repaid out of the proceeds of this lawsuit. If the defendants at that time, long before the trial of this action began, desired further information regarding those agreements or to see copies thereof, they should have asked

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for them. Having wholly failed to do so or explore this area in any way, they should not now be granted leave to serve a supplemental complaint. A new trial may not be granted for newly discovered evidence which with reasonable diligence might have been discovered and produced at the trial. *Knight v. Hersh,* 1963, 313 Fed. 2d 879, 114 U. S. App. D.C. 198. See, also, *Mayer v. Higgins*, CANY 1953, 208 Fed. 2d 781; *Grant County Deposit Bank v. Greene,* CA Ky. 1952, 200 Fed. 2d 835; *Pasotex Pipe Line Co. v. Murray,* CCA Tex. 1948, 168 Fed. 2d 661; *U. S. v. Bransen,* CCA Wash. 1944, 142 Fed. 2d 232; *Electric Pipe Line v. Fluid Systems,* DC Conn. 1955, 132 Fed. Supp. 123, aff'd 231 Fed. 2d 370; *Eastern Airlines v. U. S.,* DC Del. 1953, 110 Fed. Supp. 499; *Reed v. Kellerman,* DC Pa. 1941, 2 FRD. 195; *Moylan v. Siciliano,* C.A. Guam 1961, 292 Fed. 2d 704. See also Note 43 to Fed. Rules Civ. Proc. 59, Rule 59, 28 USCA.

POINT III

THE DEEDS OF RELEASE IN FULL AND FINAL ACCORD GIVEN ISRAEL AIRCRAFT BY THE CREW MEMBERS WERE NOT GENERAL RELEASES

A general release is a piece of paper evidencing an intention by one party to give up all their rights and claims against another usually arising out of a dispute or accident and usually in consideration of some payment or promise on the part of the party released. Unlike a stipulation of discontinuance, a general release does not require the prior

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institution of a lawsuit. Acceptance of a general release is not an admission or evidence of responsibility or liability on the part of the party released. It is not an indication of the merits of a party's claim or the lack of them. It is not a payment made under compulsion. It is a payment made, often, to avoid litigation or to resolve a dispute without the need for litigation or arbitration. In many cases, it may subsequently prove to have been an unnecessary payment. In such case, it is considered by the courts to have been a gratuitous payment and not recoverable.

The title of the document signed by Hagai Koren (defendants' Exhibit C annexed to their moving papers herein) is *Deed of Release in Full and Final Accord.* The title of as well as the body of the document was drafted by IAI's attorneys. It was signed by Hagai Koren without the aid or advice of counsel. Yet despite the impressive words "Full" and "Final" incorporated in the title of the document, a reading of the document clearly indicates there is nothing either full or final about it. Paragraph 5 thereof clearly indicates that it was an open end agreement and not a general release. Paragraph 5 thereof specifically states in part as follows:

> Should any test to be made by the medical committee of the National Insurance Institute establish permanent invalidity and/or invalidity which will entail any type of surgery, I am reserving my right to apply to IAI in order to have renewed negotiations in respect of the amount of compensation.

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By its very nature, a general release is not subject to renewed negotiations once executed and delivered. It is a document of finality. Anything inconsistent with that finality destroys its validity as a release. Further, the document was not obtained by Israel Aircraft or signed by Hagai Koren in a vacuum. The document was drafted by IAI with the express intention that the crew members should join with their employer in suing the negligent defendants herein for full recovery of damages sustained and that IAI should recoup out of the settlement of this case the monies paid to the crew members. The result was the creation of the Workmen's Compensation lien and the prevention of a possible suit against Israel Aircraft by the crew members which might prejudice Israel Aircraft's own case for the loss of its aircraft against the defendants. Conspicuously absent from IAI's moving papers in these post trial motions is an affidavit from any of IAI's advocates (Pinhas Ben Zvi or N. Sadah) that in obtaining the crew members' signatures to these agreements they explained to them clearly and specifically that the crew members were waiving forever and all time any rights they had against anyone as a result of the injuries sustained in the accident. The purported "certification" at the end of the agreements by IAI's advocates that they "read and thoroughly explained to him its contents and the consequences resulting therefrom" falls far short of an affidavit that they in fact told the crew members that by signing these agreements acknowledging receipt of compensation payments from IAI that they were forever and all time waiving or releasing all rights they had against anyone else for the damages and injuries they sustained in the crash of 029.

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At this time it should be noted that neither Israel Aircraft nor the defendant have ever presented this Court or Fuchsberg & Fuchsberg with copies of the original agreements allegedly signed, executed and delivered to IAI by the crew members. The undersigned has received copies of the original Hebrew agreements from Zohar Landau and Mordechai Muscatel, but Hagai Koren has consistently stated to me that he never signed any such agreement in Hebrew or otherwise. Further, neither Israel Aircraft nor the defendants have ever attached certifications authenticating the accuracy of the translations of the alleged agreements.

Assuming, *arguendo,* that defendants' exhibits A, B and C are all accurate translations of the original Hebrew agreements, an examination thereof will disclose that each one is different in its terms and provisions and each was expressly drafted by IAI to cover the situation of each specific employee.

The deed given by Zohar Landau (defendants' Exhibit A) contains its "release" language in Paragraph 3 thereof. That paragraph specifically states that Zohar Landau, "hereby release IAI and/or the Ministry of Defense and/or any one of them and/or any other person or legal body *in their name and/or in their stead,* from any responsibility and/or liability whatsoever in connection with the said accident." It is clear from a plain reading of Paragraph 3 that Zohar Landau intended to release only IAI, the Ministry of Defense and any other person or legal body in the name or place of IAI or the Ministry of Defense. There is no language in that paragraph or any other paragraph of Exhibit A from which it can fairly be inferred that Zohar Landau knowingly intended to release any rights he had against any

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other third persons who might be responsible for his injuries. Paragraph 1 of Exhibit A, which acknowledges receipt of the 75,000 Israeli pounds specifically states that it is in settlement of all claims and demands *against IAI and/or the Ministry of Defense.* Again, there is no indication whatsoever that Zohar Landau knowingly intended to give up any rights of recovery he might have against third parties. (At all times, it must be borne in mind that these documents were drafted by Israel Aircraft Industries and must be construed most favorably to the employees. Moreover, Israel Aircraft was the only aircraft manufacturer in the State of Israel and if the employees wished to continue working there, they had no alternative but to sign those agreements and at no time during that period were any of the crew members represented by legal counsel.) Paragraph 4 of Exhibit A provides that Zohar Landau will protect Israel Aircraft from any claims made by anyone else in his name or on his behalf to the 75,000 pounds Israel Aircraft paid him. Clearly, the defendants in this case on their counterclaims against Israel Aircraft are not suing in the name of, instead of or under any theory of subrogation to Zohar Landau. Nor does Paragraph 4 of Exhibit A create any lien in favor of Israel Aircraft on the proceeds recovered by Mr. Landau against the defendants in this case. All Paragraph 4 required was for Zohar Landau to hold IAI harmless from any claims from anyone else suing in his name or on his behalf for that same 75,000 pounds. Inasmuch as that situation has not arisen, that paragraph has no application.

Paragraph 5 of Exhibit A is wholly inconsistent with a general release. It evidences, rather, an agreement

or understanding between Zohar Landau and his employer that his employer was under no future obligation to employ him as a pilot but only as an engineer and that should Israel Aircraft desire to employ him in the future as a pilot, the terms therefor would be subject to negotiation. Again, we are looking at language that does not belong in what is supposed to be a general release; it is language that is part of an agreement and understanding between Israel Aircraft and Zohar Landau.

Exhibit B is Mordechai Muscatel's agreement with Israel Aircraft. Paragraph 1 is an acknowledgement of the receipt of 10,000 Israeli pounds in settlement of all his claims against Israel Aircraft and/or the Ministry of Defense. The "release" language contained in Exhibit B appears in Paragraph 3 thereof. In it, Mordechai Muscatel states, "I hereby release IAI and/or the Ministry of Defense and/or any one of them and/or any other person or legal body in their name and/or in their stead, from any responsibility and/or liability whatsoever in connection with the said accident." The release is specific. It releases Israel Aircraft and the Ministry of Defense and anyone who might be sued in their name or place. It releases neither explicitly or by implication any third persons.

Paragraph 4 of Exhibit B requires Mordechai Muscatel to hold Israel Aircraft harmless from any claims made by anyone else in his name or in his place. Inasmuch as the defendants' counterclaims are not being made in his name or in his place, Paragraph 4 has no application to our lawsuit.

Paragraphs 5 and 6 of Exhibit B are wholly inconsistent with language that belongs in a general release.

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It is clearly language that belongs in some sort of agreement or understanding between two parties. Paragraph 5 recognizes that Israel Aircraft is not obligated to continue employing Mordechai Muscatel as a flight test technician and contains Mr. Muscatel's acquiescence to work in any other job imposed upon him under the terms customary with Israel Aircraft in respect to such a job.

Paragraph 6 of Exhibit B permits Mordechai Muscatel to be occasionally absent from work without salary deduction for the purpose of receiving medical checkups and receiving treatment in connection with the injuries sustained in the accident provided he submits a medical confirmation that the treatment or tests were necessary due to the accident and it provided further that he will not be out more than twenty-six days per year in connection therewith. The undersigned has never in his life prepared or heard of a general release which contains language such as appears in Paragraphs 5 and 6 of Exhibit B.

Exhibit C is Hagai Koren's agreement with Israel Aircraft. Paragraph 1 thereof provides that the 5,000 Israeli pounds received from his employer is in full settlement of all claims and demands he has against Israel Aircraft and/or the Ministry of Defense and/or the State of Israel. There is no reference, directly or indirectly, in that paragraph to claims or possible future claims against any third persons.

Paragraph 3 of Exhibit C is both significantly and appreciably different than Paragraphs 3 of Exhibits A and B. Bearing in mind that Hagai Koren emphatically denies giving any release to Israel Aircraft and that the original Hebrew release allegedly given by Hagai Koren to Israel Aircraft has never been produced (nor have I

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ever seen a copy of it) and further that neither IAI nor the defendants have attached any certification attesting to the accuracy of the translation of these documents into English, the following observations are in order. In comparing Paragraph 3 of the Koren agreement to Paragraph 3 of the Muscatel and Landau agreement, it would appear that the translator or typist of the Koren agreement (defendants' Exhibit C) either rushed or abbreviated the English translation. For example, according to the language of the agreements, Landau and Muscatel released only IAI, the State of Israel, the Ministry of Defense and *any others who might be sued in their name or in their place.* That language is missing from Paragraph 3 of the Koren agreement which states that Hagai Koren releases, "IAI, and any other person or legal body from all liability whatsoever in connection with the said accident." It is also noted that the typist started to type something else after the word "release" and then crossed it out. Bearing in mind that Israel Aircraft attorneys drew these agreements, why should IAI have Landau and Muscatel release only IAI, the Ministry of Defense and the State of Israel and anyone else who might be sued in their name or place, but have Hagai Koren release every other person in the whole world? Neither the undersigned nor Fuchsberg & Fuchsberg have or have ever seen a copy of the original Hebrew "deed" allegedly signed by Hagai Koren and Hagai Koren insists that he has never signed one. Hagai Koren is not raising a technical objection here. He, as well as the undersigned, believe in all good faith that defendants' Exhibit C is not an accurate translation of anything that Hagai Koren signed and gave to Israel Aircraft.

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Until such time as Israel Aircraft or the defendants produce a copy of the original Hebrew agreement claimed to have been signed by Hagai Koren, we must ask this Court to disregard the language of Exhibit C. It is simply not trustworthy. Furthermore, the language of Paragraph 5 of Exhibit C clearly indicates that the document was not intended by either Hagai Koren or Israel Aircraft to be a general release or even a final determination of Hagai Koren's rights against Israel Aircraft, because Paragraph 5 thereof specifically provides that

> Should any test to be made by the Medical Committee of the National Insurance Institute establish permanent invalidity and/or invalidity which will entail any type of surgery, I am reserving my right to apply to IAI in order to have renewed negotiations in respect of the amount of compensation.

Even if Paragraph 3 is properly translated, the inference of general release to be drawn therefrom is destroyed by the right to reopen Hagai Koren's claim through Paragraph 5. A document which does not finally determine and settle and dispose of all claims of one person against another is not a general release.

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POINT IV

UNDER ISRAELI LAW A GENERAL RELEASE RELEASES ONLY THOSE PERSONS SPECIFICALLY NAMED THEREIN

The agreements between Zohar Landau, Mordechai Muscatel and Hagai Koren were executed in Israel between an Israeli employee and their Israeli employer. All were citizens and residents of Israel. The agreements arose out of an accident that occurred in Israel in connection with the crew members' employment. It is clear from a reading of the three agreements that they were drafted in reliance upon applicable local Israeli law. Clearly, no one relied upon New York law in drafting the agreements and New York has absolutely no interest in applying its law through an interpretation thereof or in giving effect to them. There can be no question but that the law of Israel should govern whatever effects are to be given and whatever interpretations are to be made to those agreements. In order to avoid unnecessary redundance, the undersigned respectfully incorporates herein pages 9 through 17 of the crew members' Memorandum of Law in opposition to Israel Aircraft's motion for summary judgment dismissing the defendants' counterclaims.

In evidence is the official English translation of the Israeli Civil Wrongs Ordinance (new version). Section 11 thereof specifically provides that,

> When each of two or more persons is liable under the provisions of this Ordinance for any act and such act constitutes a civil wrong, such persons shall be jointly liable as joint civil wrongdoers for such act and may be sued therefor jointly or severally.

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Section 3 of the Civil Wrongs Ordinance (new version) provides that,

> The matters in this Ordinance hereinafter enumerated shall be civil wrongs, and subject to the provisions of this Ordinance, any person who suffers any injury or damage by reason of any civil wrong committed in Israel shall be entitled as against the person committing or liable for such civil wrong to the remedy hereinafter specified.

The Civil Wrongs Ordinance (new version) was enacted and became effective in Israel on April 17, 1968. It has in effect in Israel since then.

When Israel first became a State in 1947, it began its body of common law by adopting, generally, the common law of England. The original English common law was that a release given to one person, released all persons. In the years that followed, that doctrine was attacked in both England and Israel as unsound and not consistent with the probable intentions of the party giving the release. If "A" releases "B", why should it be inferred that "A" was also releasing everybody else? If the releasor intended to release everyone else who might be liable, he could specifically so state. Through the fifties and sixties, the doctrine that a release to one is a release to all became more and more unpopular in Israel. By 1969, Israeli Courts had adopted the position that a general release releases only those parties specifically named therein.

In C.A. 30/73 (attached to defendants' moving papers as Exhibit E) the Israeli Supreme Court specifically held that a general release releases only those parties

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specifically named and designated to be released in the document. In the release before the Court in that case, the plaintiff had given a defendant a release specifically reserving the plaintiff's rights to proceed against another person. In striking the defense of general release raised by a later defendant, the Supreme Court held that the general release given the first defendant released only the first defendant and did not in any way affect the plaintiff's rights to pursue a remedy against the second defendant *and that it was not necessary for the plaintiff to specifically reserve any rights against anyone else in the first release.* It is true as Mr. Beinisch states in his affidavit of April 12, 1976 that in 30/72 the plaintiff had expressly made a reservation of rights, but the Court also held that such reservation was superfluous and unnecessary because under Israeli law a general release releases only those persons specifically named in the release.

Accompanying this Memorandum of Law is an affidavit of an Israeli attorney, Ephraim Abramson, an associate of the distinguished New York law firm of Wachtell, Lipton, Rosen & Katz. In his affidavit, Mr. Abramson, who knows defendants' Israeli counsel Mr. Beinisch quite well, points out the specific errors and inaccuracies in Mr. Beinisch's affidavit and sets forth not only his opinion as to what the Israeli law is, but his specific citations and authorities therefor. I think the Court will agree after considering Mr. Abramson's affidavit that the agreements made by the crew members with their employer are not and were never intended to be general releases and further, that under Israeli law, general releases release only those persons specifically named therein.

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Conclusion

1. It is respectfully submitted that under Sections 12 through 15 of the Civil Wrongs Ordinance (new version) of Israel, Israel Aircraft Industries, Ltd. is permanently estopped and barred from raising the defense of General Release at this time;

2. The agreements entered into between the plaintiff crew members and their plaintiff employer were not General Releases;

3. A General Release under Israeli law releases only those persons specifically named therein;

4. Because these agreements were executed long before the defendants' answer was served, their existence may not now be pleaded through a supplemental answer; and

5. Defendants may not now move for a new trial on the grounds of newly discovered evidence because they did not exercise due diligence in attempting to learn of their existence before trial.

Respectfully submitted,

FUCHSBERG & FUCHSBERG
Attorneys for Plaintiffs Landau,
Muscatel and Koren

Norman Leonard Cousins
Of Counsel

Pages 86, 87, 97, 98 and 99 of Deposition of Zohar Landau, Annexed to Foregoing Memorandum.

A. I don't know if he is an employee the infirmary within the company.

Q. Do you remember how he evaluated your injuries as a patient?

Mr. Cousins: Objection that will be hearsay.

Examination Continued by Mr. Murphy:

Q. Are you receiving disability payments from either your employer or the Israeli Government? A. Yes.

Q. Do you know what percent of disability you are rated at? A. 43%.

Q. Can you tell me Sir how much you were receiving in disability payment benefits? A. Today?

Q. Yes, at this present time. A. I got from the Israeli Government six-hundred and ninety pounds per month.

Q. From your employer? A. I get nothing today.

Q. Is that the sum of your benefits as a result of the accident; that is six-hundred and ninety pounds; is that the total? A. I got every month from the Israeli Government because of my injury.

Q. Do you have any other monies from any other sources? A. I got from my employer.

Q. How long did you receive benefits from your employer? A. I didn't get, I got a lump sum from my employer.

Q. How much was that? A. Seventy-five thousand pounds.

Q. Have you received or did you receive as a result of your injuries any other benefits or payments? A. I got what you call a benefit when you are buying a car, I have a certain partial exemption from taxes.

Q. Just in relationship to buying a car or overall? Could you describe again this tax exemption that you receive? A. If I am buying a car having this percentage, and this car is for the intention of my personal use for work therefore the government gives an exemption from the tax, it is a partial exemption while I bought the car.

Pages 86, 87, 97, 98 and 99 of Deposition of Zohar Landau, Annexed to Foregoing Memorandum

Q. Once again your evaluation, examination was

* * *

Q. Do you have any restrictions now, physically that would prevent you from renewing your pilot license? A. Yes, to fly.

Q. I believe, you stated your pilot license is not in effect? A. Yes.

Q. Do you have any restrictions that would prevent you from renewing or restating your driver's pilot license? A. Beside these—no. Maybe I should correct that not being able to fly anywhere right now I can't accumulate flying time, therefore, I can't renew my license.

Q. Therefore if you wanted to do private flying? A. Yes, as long as I fill these three requirements.

Q. Are you making a claim for lost earnings?

Mr. Cousins: Yes.

Examination Continued by Mr. Murphy:

Q. Do you have the figures at that point as to how much lost earnings is being made? Counsel would you provide these?

Mr. Cousins: In answer to the interrogatories I assume you asked them in your interrogatories, I will leave a space in this report and see if they have been answered.

Mr. Murphy: Fair enough.

Q. Can you tell what your personal salary was from I.A.I.? A. Gross—208 pounds a month.

Q. Do you know the conversion to U. S. dollars? A. It's one dollar to 4.2 Israeli pounds.

Q. Mr. Landau is there a lien in any of the recoveries in anyway as a result of this? In other words, is the amount of money you must pay back to the Israeli Government, could you recover anything in this lawsuit? A. As

Pages 86, 87, 97, 98 and 99 of Deposition of Zohar Landau, Annexed to Foregoing Memorandum

far as I know I do not have to give to the Israeli Government any money.

Q. I show you this stack of papers relating generally to your medical condition and ask you to look at paragraph 13 and read it please.

Mr. Cousins: To yourself.

A. Yes.

Examination Continued by Mr. Murphy:

Q. Does that refresh your recollection as to whether or not you must reimburse the Israeli Government for any proceeds?

(Whereupon off the record a discussion was held.)

Examination Continued by Mr. Murphy:

Q. Mr. Landau I rephrase the question to indicate—must you reimburse your employer or concern for monies that you get in this lawsuit? A. I have the sum to myself, after deduction of the 75,000 Israeli pounds which I should return to my employer.

Q. Do you have the amount of money that you have seventy-five thousand pounds that you mentioned before? That was a lump sum payment? A. Right, now, I don't know if they are going to require additional expenses.

Q. Did you observe the landing of the other members of the crew after you landed? A. No.

Q. Did you land in the same vicinity? A. I don't know if you call it a vicinity I didn't see any of them throughout the landing.

Q. Do you contemplate any additional surgery or treatments for the injuries you sustained in this accident at any time? A. What do you mean?

Pages 35 and 40 of Deposition of Mordechai Muscatel, Annexed to Foregoing Memorandum.

A. No.

Q. Is there an agreement with your employer, I.A.I., that you must pay them back money they have paid you if you receive money in this lawsuit? A. Yes.

Q. Can you tell me how much money you received in benefits or pensions as a result of these injuries up to the present time? A. Yes, I've got 10,000 pounds.

Q. Was that a single payment from your employer? A. Single time, once.

Q. Do you now receive any pensions from either the government or your employer as a result of these injuries? A. Not right now, but I did get, because of my temporary invalidity.

Q. At the present time, do you still have a disability rating of five percent? A. Yes, for always.

Q. Are you receiving a special pension for this disability? A. No, because of those kinds of invalidity we get it just once, altogether.

Q. Is it a correct statement you returned to work on April 22, 1970?

By Mr. Cousins:

Q. Were you receiving flight pay back in 1970 when you were on the flight tests? A. Yes.

Q. Are you receiving flight pay now? A. Yes.

Q. Can you tell us what the 10,000 pounds lump sum payment you received from I.A.I. represented? A. I think there was an agreement between me and I.A.I. to get that sum of money because of what happened to me.

Q. Does the sum of money have some relationship to—let me withdraw that.

Was this money paid to you as a result of your injuries sustained in this accident? A. Yes.

Q. Pursuant to the agreement between yourself and I.A.I., this money must be repaid to them out of any you might get as a result of this lawsuit? A. Yes.

Q. Do you feel as healthy and well today as you did before the accident?

Mr. Murphy: I object to the form of the question. Would you explain what you mean by healthy?

Pages 97, 98 and 99 of Deposition of Hagai Koren, Annexed to Foregoing Memorandum.

Is there any claim of permanency so far as the healing of the fractured ulna?

Mr. Cousins: Other than it is palpable and under the skin there is a deformation. There is no scar and relatively, or no limitation of movement other than pain and tiredness from any extensive activity.

Off the record.

(Discussion off the record.)

By Mr. Murphy:

Q. At the present time, Mr. Koren, do you have a certain disability, percentage disability, from the Israel Government? A. At a certain time?

Q. At the present time? A. No.

Q. Can you tell me what disabilities, by percentage, you had at what periods and were they changed at some point? A. I can't remember correct, but just some of what I remember is that I believe for three months I had 100% and then they took it down to 50% for another five months and then for another two or three months they gave me 5% or 20, 25, some kind of this record.

Q. Do you recall when the last disability was removed? A. I believe it was by the end of the year.

Q. That is the end of 1970? A. Yes.

Q. Did you ever appeal or do whatever you have to do to challenge the ruling of the government as to whether or not you—did you ever challenge the removing of the disability from your records? A. I did not.

Q. Will you tell me, as a result of the disability, what type of payments you received from the government?

For example, what would 100% disability, which you say you were receiving for sometime, what would that amount to, if you know? A. At that time, they were referring to a top salary, which is defined by the law and I believe it was 1500 pounds.

Q. Per month? A. Per month.

Pages 97, 98 and 99 of Deposition of Hagai Koren, Annexed to Foregoing Memorandum

Q. Is that what you received? A. Yes.

Q. Once again, roughly, how long did you receive that? A. I think it was for a period of three months and then —well, it is a little bit complicated and I think I should explain it.

I received my salary, the whole salary from the company and this money I had to give the company.

Q. You were receiving full salary from the company? A. Yes.

Q. You had to reimburse them from the money the government gave you? A. Yes, it is a Social Security money and not the government.

Q. It is accurately called Social Security? A. Yes. I think that we didn't mention something here and this is, when your question was whether I am still suffering from some kind of pain and this has got to do with my flying with a fighter airplane, I am using an oxygen mask, a full mask and after a period of 45 minutes or an hour, this portion of the nose—

Mr. Cousins: Indicating the bridge near the top.

A. —which was broken, began to swell and it is hurting.

Q. Are you married? A. Yes.

Q. Do you have any children? A. Yes. I have three.

Affidavit of Ephraim Abramson, Annexed to Foregoing Memorandum.

State of New York,
County of New York, ss:

EPHRAIM ABRAMSON, being duly sworn, deposes and says:

I am an advocate and member of the Israel Chamber of Advocates, and was admitted to the Bar in Israel in October, 1971. I am a graduate of the Faculty of Law of the Hebrew University of Jerusalem. I was a teaching assistant of the Faculty, from 1970 to 1975, of corporate law.

I was associated from 1971 to the end of 1975 with the firm of Spear, Toussia, Cohen & Co. in Israel and now am a foreign associate with the firm of Wachtel, Lipton, Rosen & Katz here in New York.

At the request of Norman L. Cousins, Esq., I carefully read the two Israeli agreements executed by Zohar Landau and Mordechai Muscatel at the request of Israel Aircraft Industries, Ltd., as a result of and following their accident of January 21, 1970. I have also read what is purported to be an English translation of an agreement allegedly signed by Hagai Koren.

I have also read the pages of the depositions of these three gentlemen which are appended to Mr Cousin's Memorandum of Law. In addition, I have also carefully read the exhibits annexed to the defendants' moving papers of April 19, 1976, with particular attention to the affidavit of Mr. Y. Beinisch, dated April 12, 1976, together with the Israeli cases annexed thereto.

I was advised that the granting of new trials in American Federal Courts is governed by the rules of the trial court, in this case, the Federal Rules of Civil Procedure, and the law of Israel would have no application.

Even under Israeli law, the agreements made by crew members were neither executed nor given after the verdict in this case and hence, do not constitute an event occurring after the verdict (C. A. 282/68) nor would it constitute

newly discovered evidence, because had the defendants exercised due diligence or reasonable care in the conduct of their pre-trial discovery proceedings, they would have (and should have) learned of the existence of these agreements and examined them before the trial.

Under the Israeli doctrine of "Finality of Judgment", a litigant may not raise an issue after the trial, which he should have and could have by the exercise of due diligence raised during the trial.

There is no doubt in my mind that neither Israel Aircraft Industries, Ltd. nor the crew members ever intended the agreements signed by the crew members to be General Releases. I was advised that as soon as IAI settled with the crew members, it retained the law firm of Condon and Forsyth to represent itself and the injured crew members to prosecute a negligence suit in New York against the defendants in this case. I understand that IAI's purpose was to recoup the loss of its aircraft and secure repayment of the compensation it had paid the crew members through the lien on their recoveries against the defendants. This is clear from IAI's written answers to question 13 propounded by the defendants (defendants' Exhibits H-1 and H-3), as well as the testimony of the crew members, appended to their Memorandum of law.

If Israel Aircraft Industries, Ltd. believed that they had obtained General Releases from Landau, Koren, and Muscatel, then it had an ethical and legal burden to plead that fact as an affirmative defense to defendants' counterclaim. By failing to do so, they would be estopped by the Israeli doctrine of "Finality of Judgment" from raising it at this time.

In point 7 of his affidavit, Mr. Beinisch cites the Israeli Supreme Court case, C. A. 344/56, for the proposition, ". . . that the fact that an employee received compensation for damages from a third party". He attached a photostatic copy of that decision to his affidavit as Exhibit "C".

Affidavit of Ephraim Abramson, Annexed to Foregoing Memorandum

Although I am of the opinion that C. A. 344/56 has no relevancy to the facts of this case, it is unnecessary to discuss the point further because the ordinance upon which C. A. 344/56 was based was repealed *in toto* by the National Insurance Law, 5714-1953, more than 15 years before the agreements entered into by the crew members were executed. Attached hereto is an official English translation of Section 25 of the National Insurance Law, 5714-1953, which repealed the ordinance upon which the decision in C. A. 344/56 was based. There is no prohibition whatsoever in Israel at this time against an injured employee suing a responsible third party.

Mr. Beinisch states on page 9 of his affidavit that, "Once a claimant has claimed from one tortfeasor and obtained any sum from one of them, the second tortfeasor is exempt." I do not agree with that statement.

The Civil Wrongs Ordinance (New Version) provides that where a plaintiff has recovered and collected in full a judgment against a tortfeasor, he may not, thereafter, collect on a judgment against a second tortfeasor for the same damages. [C.W.O. (NV) Sec. 11 & 83].

If, however, a plaintiff recovers a judgment against a tortfeasor but is unable to collect in full, he may, thereafter, sue and recover a judgment against a joint tortfeasor and collect thereon, provided that the total collection under both judgments does not exceed the amount of the judgment first recovered [C.W.O. (NV) Sec. 83].

If the plaintiff went to trial against the first tortfeasor and failed to recover a judgment, he would *not* be precluded from suing, obtaining and collecting on a judgment against a second joint tortfeasor. Attached hereto is the complete official Israeli decision in C.A. 49/63, as authority therefor.

Mr. Beinisch cites C.A. 30/72 in paragraph 9 of his affidavit. In that case, the Israeli Supreme Court had before it a release which contained a reservation of rights against a named third person. In a suit against the named third person, the defendant raised the defense of release. In

dismissing the defense, the Court said, without qualification, that under modern Israeli law, a release does not release anyone not specifically named therein. (The emphasis indicated by the underlining in paragraph 9 of Mr. Beinisch's affidavit is his, not the Court's.)

On page 233 of the Israeli Supreme Court decision in C.A. 30/72, Judge Witcon stated:

(Translated into English)

> "The origin at Section 61 (in the old version of the Civil Wrongs Ordinance) is based on the English Common Law which said that a release from liability of one of the joint tortfeasors releases all of them, because the cause of action is one and cannot be divided. My learned colleague, Justice Landau, already noted in C.A. 49/63 on page 354, (attachment A to my affidavit) that all those judgments in which the common law rule was stated (cases cited) were before the English Act of 1935 on which our Section 64 (1)(a) is based. In the English Act of 1935, recognition was given to the rule that the injured party has separate causes of action against every one of the joint tortfeasors, and, therefore, it is consistent that the injured will be free to file as many claims as he has causes of action."

Professor Gad Tedeschi is recognized as one of the leading authorities on the law of Israel. In his book, *Tort Law*, he states:

Affidavit of Ephraim Abramson, Annexed to Foregoing Memorandum

(Translated into English)

"Release of Tortfeasor from Liability"

"The English Common Law was, and it is today, that a release given by the injured to one tortfeasor of the joint tortfeasors releases also the other tortfeasor because the release extinguishes the cause of action. It is not so for a covenant not to sue; because such a covenant presupposes the existence of liability, and therefore, does not hurt the cause of action. We have already seen that those doctrines are based on the principal of 'The Unity of the Cause of Action'. From our approach, the principal of 'The Unity of the Cause of Action' was not transferred to the Civil Wrongs Ordinance, and it flows therefrom that in Israel, we do not have to follow that distinction. A release from responsibility of one tortfeasor per se does not release the other tortfeasor and, therefore, there is no place (in Israel) for the distinction between a release and a covenant not to sue." (Attached hereto are pages 486-492 of Tedeschi's *Tort Law*.)

Point 10 of Mr. Beinisch's affidavit is irrelevant to this lawsuit, as it does not concern the defendants whether or not the crew members must repay to their employer out of the proceeds of this lawsuit compensation paid them by IAI. This is a question of local Israeli law and concerns only IAI and its employees. There is nothing in the agreements signed by the crew members which obligates them to do so, but if they have otherwise already agreed or are obligated to do so under Israeli law, then they will make the repayments.

Section 86 of the Civil Wrongs Ordinance (New Version) specifically excludes collateral insurance payments from consideration in the determination or assessment

Affidavit of Ephraim Abramson, Annexed to Foregoing Memorandum

of damages in personal injury cases. The only exception to this rule is Section 82 of the Civil Wrongs Ordinance (New Version) which only applies to employers and has no application whatsoever to third party tortfeasors (such as these defendants).

I am informed that discovery in American Federal Courts is governed by the Federal Rules of Civil Procedure and not the laws of a foreign country. The burden is upon the party seeking disclosure to diligently pursue and obtain it and not upon his adversary to volunteer it. Furthermore, litigation is as much an adversary system in Israel as it is here, and no one voluntarily discloses information he is not asked or required to. Israel Aircraft Industries, Ltd. had an obligation to plead release as an affirmative defense because it had a counterclaim against it; but the crew members faced no such counterclaim and had no obligation to plead or disclose anything not specifically asked, (especially when the crew members never for a moment thought they had signed general releases.).

There is no doubt in my mind that the plaintiff crew members in this case did nothing under the laws of Israel to release, waive, or in any way effect any of their rights against any of the defendants in this case. The crew members are, and should be, entitled to collect the full amount of their judgment against the defendants.

(Sworn to by Ephraim Abramson, April 29, 1976.)

Plaintiff Landau, Muscatell and Koren's Supplemental Memorandum of Law in Opposition to Plaintiff Israel Aircraft Industries, Ltd.'s Motion for Summary Judgment, Filed May 7, 1976.

POINT I

IF IN FACT, THE DEEDS EXECUTED BY THE CREW MEMBERS AT THE DIRECTION OF ISRAEL AIRCRAFT INDUSTRIES, LTD. ARE GENERAL RELEASES, THEY WERE GIVEN UNDER A MISTAKE OF LAW AND FACT AND ARE VOID AS A MATTER OF LAW.

Condon & Forsyth's "Reply Memorandum of Law of Plaintiff Israel Aircraft Industries, Ltd., in Support of Motion for Summary Judgment" was not served upon the undersigned until 3:30 P.M. on April 29, 1976. In it, for the first time, Israel Aircraft made it clear that the reason they had not raised the affirmative defense of "release" in their reply to the counter-claim contained in defendants' answer, is because Israel Aircraft and its attorneys were under a mistake as to the law and effect to be given to "deed of release in full and final accord" executed at its request by the crew members. In this connection, Israel Aircraft states on page 1 of its Reply Memorandum that, "A fundamental difference between a law of Israel and that of the United States did not become relevant until the trial had been completed." On page 2, "Since this difference was not recognized, the payments made in Israel were regarded as the equivalent of workmen's compensation benefits in the United States and treated accordingly." "The only reason the Releases were not raised earlier was that U. S. counsel for Israel Aircraft Industries, Ltd., and, apparently counsel for the crew members as well as defense counsel, were unaware of the fundamental difference between the law of Israel and the law of New York, which permits direct actions by employees against their employers." (P. 8-9 of IAI's Reply Memorandum).

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The original agreements as executed by the crew members at their employer's insistence were very clear. In return for a dropping of all claims against IAI by the crew members, Israel Aircraft made certain payments to them as a result of the injuries they sustained in the bailout from Jet Commander 029. Furthermore, each of the crew members were told by their employer out of the proceeds of any recovery they might effectuate against the defendants in this lawsuit, they would have to repay to Israel Aircraft the sums paid to them by IAI. IAI not only told the crew members the agreements they had signed would not affect their rights to sue the defendants in this case, they even went out and retained legal counsel and commenced the lawsuit.

Having now been found 65% responsible for the failure of 029 and the injuries to these crew members, Israel Aircraft claims that the original agreements and deeds executed at its insistence by the crew members were made under a mistake of law or fact or both.

Basically a "release" is a knowing waiver of all of one person's rights against another in return for some consideration. What is the effect when it is given and/or accepted under a mistaken belief as to its effect either in the jurisdiction where it is given or in a foreign jurisdiction?

In seeking guidance in the resolution of this question, the undersigned went to Professor Arthur Linton Corbin's Multi-Volumed Treatise, Corbin on Contracts (a Comprehensive Treatise on the Rules of Contract Law). 3 Corbin on Contracts 597 through 621 covers the common law of mistake. Of particular interest is Section 619 thereof which deals with mistake as to the legal effect of words used in a contract or deed ("deed" is the first word in the title of the documents executed by the crew members).

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Going back to 1970 and 1971 when the crew members' "deeds" were executed, the express desire of both Israel Aircraft and its employees was to release all the crew members' claims against Israel Aircraft in return for certain sums of money and to repay to Israel Aircraft those sums of money should the crew members succeed in a third party action against other responsible defendants. (Any other interpretation of IAI's intentions at that time would have to presuppose dishonesty or an intent to commit fraud on their part.)

In Section 619 of Volume 3 of Corbin on Contracts, Professor Corbin states:

> "If two parties are in clear agreement as to the factual and legal result that they wish to accomplish, and a deed or other document is drawn by a scrivener using words that do not produce that result, the case is a proper one for reformation of the instrument. The scrivener has made a mistake, either as to the result that he was instructed to produce, or as to the legal effect of the words that he used. It makes no difference whether this is called a mistake of fact or a mistake of law or a mistake of both together. With respect to the legal effect of the words, the two parties no doubt make the same mistake that the scrivener made; and they make it because they relied on him. They are not denied reformation by calling this mistake a mistake of law. If the parties thought that the instrument contained words that it did not contain, their mistake is one of fact. If they knew the words that were used and assented to them, their assent being induced by the belief that the legal effect of those words was an effect that they do not have, their mistake is a mistake of law.

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> Even if the words of the instrument were chosen and written down by one of the contracting parties and were assented to by the other, the result is the same. They were mistaken as to the legal effect of the words so chosen; and it is immaterial whether they were misled in this matter by a scrivener employed for the occasion, by a book entitled, "Everyone His Own Lawyer," or by other antecedent instructors.
>
> In some of the cases within this section, the mistake of law was unilateral, being directly induced by a fraudulent misrepresentation of the law by one of the parties. In other cases, the mistake was mutual, but the injured party was induced to make it by the innocent misrepresentations of the other. Such representations are added factors in inducing a Court to grant relief."

If in fact what the crew members executed at their employer's behest and drafting, was a general release, then both the crew members and their employer were under a mistake as to its nature and legal effect and a rescission or cancellation of that agreement should be made. Should this Court so agree, the crew members are willing to have all three "deeds" cancelled and will make full repayment and restitution to Israel Aircraft of whatever sums of money were paid to them by their employer.

Having now been found 65% liable, Israel Aircraft, having suddenly learned of its "mistake" desires to take advantage of its "mistake" to deprive the crew members of the benefits of their judgment. To this Professor Corbin states:

> "When two parties have agreed upon the words in which a contract is expressed, the fact that one

> of them misunderstood the legal effect of those words is not ground for rescission if the other party had no reason to know of this misunderstanding and has changed his position so that he cannot be put *in statu quo.* (3 Corbin on Contracts 619, at p. 769)
>
> A contract, the making of which is induced by mistake as to the legal effect of the words in which it is expressed, will be rescinded or reformed." *Ibid.*

Applying the foregoing principle of law to the facts of this case, IAI and the crew members agreed upon the wording of the "deeds" executed by the crew members. The "deeds" were wholly drafted by IAI's attorneys for the crew members, who were without the aid of legal counsel, to sign. If IAI understood the legal effect of those documents and the crew members had no reason to know of IAI's misunderstanding and have changed their position and reliance thereon and can no longer be restored to their *status quo,* then IAI may not claim "mistake" at this time to the prejudice of the crew members. Have the crew members changed their position to their prejudice? I think so. All three of them have engaged in a lengthy protracted world wide litigation at tremendous cost and personal sacrifice. They have successfully obtained a judgment which flowed from their efforts and are now being told it is void. It is respectfully submitted that IAI's conduct at this time runs afoul of the foregoing principle of law.

Section 620 of Volume 3 of Corbin on Contracts tells us that:

> "Mistake as to a person's existing legal rights is treated as a mistake of fact in determining

> whether such remedies as reformation or rescission and restitution should be decreed. This is true, even though the mistake as to rights was directly caused by a mistake or ignorance of some general rule of law. It is true with respect to all kinds of jural relations and interests, whether rights of property, contract rights, or rights respecting personality." *Ibid.* p. 771.

The foregoing section also tells us that while compromise settlements are not customarily set aside on the grounds of mistake, they may be where a mistake was not something over which the parties were consciously disputing. (Here, of course, there is no dispute between Israel Aircraft and the crew members at the time the "releases" were executed as to whether or not they were in fact "releases".)

Section 621 (Mistake of Foreign Law) tells us that:

> "A mistake as to foreign law, including the law of sister states, is treated as a mistake of fact. Foreign law is no different in character from domestic law." *Ibid.* p. 772-773.

It serves Israel Aircraft little good to claim that the parties' mistakes herein were between the law of Israel and the law of New York.

Before leaving Professor Corbin, a brief look at Section 618 of Volume 3 of Corbin on Contracts is on order. Section 618 governs "Mistake of Law Caused by Misrepresentation," and states:

> "If the mistake of law that induced the making or the performance of a contract by one party was caused by a fraudulent misrepresentation of

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> the law by the other, or by his innocent misrepresentation if the relations of the parties are such to make it reasonable for the one to rely upon the representations of the other, the appropriate relief by rescission, restitution, or reformation will be given to the injured party." *Ibid.* p. 761.

Throughout the negotiations between Israel Aircraft and its crew members in 1970 and 1971, Israel Aircraft was represented by professional legal counsel. The crew members were represented by no legal counsel. Whatever understanding the crew members had of the agreements that Israel Aircraft required them to sign, came from Israel Aircraft's own attorneys. (In this connection, the Court's attention is respectfully directed to the certification by Israel Aircraft's attorneys that they read and throughly explained the "deeds" to each of the crew members.) The crew members had no legal education, were told by their employer that they had to sign those releases if they were to receive their compensation from Israel Aircraft and were specifically told that they would be able to join with Israel Aircraft in bringing lawsuits against the defendants in this case. If this Court believes, as does the undersigned, that the relations of the parties were such as to make it reasonable for the crew members to rely upon the representations of their employer's attorneys, then relief by way of rescission or cancellation should be afforded the injured crew members by this Court.

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POINT II

THERE ARE A NUMBER OF SUBSTANTIAL ERRORS IN IAI's REPLY MEMORANDUM.

Condon & Forsyth states on page 4 of its Reply Memorandum of Law that, "All parties were aware prior to trial that the crew had received compensation for their injuries under the law of Israel. *However, it was not understood that these payments were from two sources, (1) a payment by the National Insurance Institute of the State of Israel and (2) the direct payment by Israel Aircraft Industries, Ltd. in settlement of the right of action which, under the law of Israel, an employee has against its employer for injuries sustained in the course of employment.*" The quoted sentence which has been underlined is completely false. Both Israel Aircraft and the crew members were fully cognizant that certain payments had been made by the National Insurance Institute of the State of Israel and that other payments had been made directly to the crew members by Israel Aircraft Industries, Ltd. This was specifically testified to by the crew members in their depositions and was specifically stated by Israel Aircraft in its written answers to defendants' questions (Exhibit H, H-1, H-2, etc. to defendants' moving papers herein). There was not, is not and has never been any confusion by anyone as to the fact that the crew members received certain payments from the National Insurance Institute of Israel and other payments directly from Israel Aircraft Industries, Ltd.

Condon & Forsyth state at the bottom of page 6 of their Reply Memorandum that, "All plaintiffs were fully aware of the existence of the Releases from the beginning

of this lawsuit." That statement is true only regarding Mordechai Muscatel and Zohar Landau and only insofar as it concerned Israel Aircraft, the State of Israel and the Ministry of Defense. It was completely untrue as to Hagai Koren whose "Release" specifically reserved the right to reopen and make further claims against Israel Aircraft. Moreover, not one of the crew members believed or had been informed that by executing those "agreements" they were releasing their rights against any other persons.

Also untrue is the statement on page 7 of IAI's Reply Memorandum that, "Such claims in tort were made by the crew members and resulted in settlements." No *claims* whatsoever were ever made by the crew members. No lawsuit was ever started nor was any piece of paper ever filed. No election of remedies was ever made. To state that the crew members made a claim in tort is a completely false statement. Assuming, *arguendo,* that under the law of Israel, an injured employee has the right to make either a workmen's compensation or a negligence claim against his employer, no election was ever made by the crew members because they never made any formal claim or brought any suit or proceeding against their employer. No category whatsoever can be assigned to the payments made to the crew members by Israel Aircraft.

The translation from Hebrew into English of Civil Case No. 794/71 which appears at the rear of Israel Aircraft's Reply Memorandum of Law is a translation of a decision of the District Court of Tel Aviv/YAFFO. It is a decision of the lowest court of jurisdiction, it is completely contrary to and was overruled by the Israeli Supreme Court decision in C. A. 30/72 which is appended

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to defendants' moving papers and which is translated in part in the affidavit of Ephraim Abramson of April 29, 1976.

CONCLUSION

It is respectfully submitted that Israel Aircraft Industries, Ltd.'s post-trial motion for summary judgment should be denied in all respects.

Respectfully submitted,

FUCHSBERG & FUCHSBERG
Attorneys for Plaintiffs Landau,
Muscatel and Koren

NORMAN LEONARD COUSINS,
Of Counsel.

Defendant's Reply Memorandum of Law, Filed May 7, 1976.

This Memorandum of Law is submitted in reply to the Memorandum of Law of Norman L. Cousins, attorney for Landau, Muscatel and Koren and the Affidavit of Ephraim Abramson.

POINT I

THIS LAWSUIT WAS BROUGHT PURSUANT TO AN ILLEGAL AGREEMENT AND THE JURY VERDICT SHOULD BE SET ASIDE AND THE COMPLAINT DISMISSED.

In support of its motion IAI has submitted the opinion of an Israeli lawyer, Dr. David Hermann. Dr. Hermann's opinion reveals that IAI in return for a contingent interest in plaintiff's claim agreed to finance their litigation against Standard Precision. In view of the vital importance of this agreement, the references to it in Dr. Hermann's opinion are set out at length beginning at page 4.

> "5 d) (1) At this stage it is worthwhile to mention that, IAI alleges that in 1972, i. e. about two years after the LMK Deeds of Release, another agreement (hereinafter "THE ADDITIONAL AGREEMENT") was entered into between IAI and LMK, whereby without affecting the other provisions of the LMK Deeds of Release:
>
> (aa) IAI, being the employer of LMK, undertook to advance and/or cause the advance of the expenses, except lawyers fees, connected with the LMK law suits, in order to enable LMK to file same against SP; and—

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(bb) LMK, on their part, in case of the success of the LMK law suits, undertook to repay IAI both the expenses to be incurred by IAI as aforesaid, and, in addition thereto, also the amounts paid to each of them under the Deeds of Release. In case of failure of the LMK Law Suits, no obligation of such refund lie with LMK;

(2) As a matter of fact, the above expenses have actually been advanced and paid by IAI or caused by IAI to be so advanced and paid;

(3) IAI alleges that the additional agreement which drafted in writing is unavailable due to misfiling. Landau denies the existence of the additional agreement. Muskatel admittedly acknowledged the existence thereof. Koren's reaction is not clear;

(4) (aa) I should like to point out that except as mentioned in Art. 13 below, this my opinion is unaffected, by the existence or non-existence of the additional agreement;

(bb) The uncontested fact of the expenses being advanced by IAI as aforesaid, is in some instances taken into consideration as one of the factual elements supporting legal conclusions, but even in those points where I took into consideration this fact, the conclusions would be unaltered, even if IAI would not have advanced to LMK expenses as aforesaid * * *.

Page 5 of Dr. Hermann's opinion.

16. (c) (5) It is admitted by IAI that IAI undertook to finance and advance the expenses connected with such Court action, under the conditions set forth in the additional agreement;

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> (6) Based upon the information received by me from IAI, in the additional agreement, it was agreed that in case of recovery by LMK of damages by SP, LMK will not only refund IAI the expenses advanced, *but even more, they will refund IAI the amounts received under the LMK Deeds of Release;*" (emphasis in original)

Page 26 of Dr. Hermann's opinion.

Dr. Hermann states that the agreement was entered into in 1972 before the commencement of this action, but the agreement contemplated the commencement of the financed litigation in New York. The parties and their counsel apparently overlooked the Judiciary Law of the State of New York which makes such an agreement illegal. Section 489 of the Judiciary Law provides in appropriate part that:

> "* * * no corporation or association, directly or indirectly, itself or by or through its officers, agents, or employees, shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon;"

It is clear that in return for funding the litigation expenses of these plaintiffs, IAI purchased or took an assignment of a contingent interest in their claim against Standard Precision. This amounts to champerty and maintenance and the statute was enacted to prevent just such activities. *American Hemisphere Marine Agencies, Inc. v. Kreis,* 40 Misc. 2d 1090, 244 N. Y. S. 2d 602 (1963).

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> "Maintenance exists when a person without interest in a suit officially intermeddles therein by assisting either party with money or otherwise to prosecute or defend it.
>
> Champerty is maintenance with the additional feature of an agreement for the payment of compensation or personal profit from the subject matter of the suit." 14 CJS 357.

Such agreements are illegal and void and their illegality may be raised by a third party in an action arising out of the contract. *Sampliner v. Motion Picture Patents Co.,* 255 F. 243 (2d Cir. 1918).

It is remarkably in the extreme that neither IAI nor the plaintiffs have seen fit to comment upon the 1972 agreement. It is, of course, a fair assumption that since the agreement contemplated the commencement of litigation in New York, it probably involved New York counsel for the parties who may well have drafted the agreement. Dr. Hermann apparently has spoken to Landau, who denied the existence of the agreement to Dr. Hermann; to Muskatel, who apparently admitted its existence to Dr. Hermann; and to Koren, whose "reaction is not clear". (Dr. Hermann's opinion, page 4). Mr. Cousins' voluminous memorandum completely ignores this additional agreement. Furthermore, if IAI's copy has been misfiled, how did Dr. Hermann get his detailed knowledge of it for his opinion in this Court.

The parties to the 1972 contract having proceeded to act in pursuit of its unlawful aims, and having succeeded, albeit not to the degree they anticipated, have had a falling out which is obvious to the Court. The individual plaintiffs wish to retain the entire awards to which their partners will have to contribute 65%. IAI seeks to enforce the agreement and to compel the plaintiffs to collect only from the innocent victim of their plan. It is respectfully submitted that a third option is available

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to the Court, and in order that justice be done, the Court should grant judgment in favor of Standard Precision against all plaintiffs, including IAI.

POINT II

Israeli law is the same as the English common law in that a release of one tortfeasor releases all tortfeasors absent any reservation of rights

Ephraim Abramson's Affidavit was submitted in support of Mr. Cousins' Memorandum of Law. Mr. Abramson is a newcomer whose qualifications are highly suspect. From his affidavit it appears that corporate law is his area of expertise. He presents this Court with no facts that indicate experience either by schooling or by practice in the area of tort law.

Abramson's main point is that the releases signed by Landau, Muscatel and Koren in 1970 and 1971 only released those specifically named in the releases, i. e., that the release of IAI did not release Standard Precision despite the absence in the releases of any reservation of rights against Rockwell or Standard Precision. Abramson relies on three points to support his position.

Abramson's first point deals with the interpretation of the Israeli case C. A. 344/56 cited in Mr. Beinisch's Affidavit. Abramson without explanation claims that this case is not relevant and further states that it was overruled by a change in the law, namely, the National Insurance Law. His attack on the foundation of this case cannot be relied upon since he does not support it with any contrary citations, and in light of the fact that this case C. A. 344/56 is a 1957 case, it is hard to see how the National Insurance Law of 1953 affected it.

The second point raised in the Affidavit of Mr. Abramson is that Mr. Beinisch, in his Affidavit in support of

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the defendant's motion for summary judgment, misuses the case of *Friedman v. Segal,* C. A. 30/72 (1973). In *Friedman v. Segal,* the injured party released a single tortfeasor and in his release specifically reserved his rights against other tortfeasors. The factual pattern of *Friedman* is obviously different from our factual pattern since the releases of Landau, Mercatel and Koren contain no reservation of rights.

Friedman v. Segal is cited by Mr. Beinisch, by Dr. Hermann and by Mr. Abramson because it sets forth certain general rules concerning the effect of releases. This case clearly supports the positions of Mr. Beinisch and Dr. Hermann. This can be seen in the quotation from the case provided in Dr. Hermann's Affidavit at page 14, paragraph i (2) (bb) which states as follows:

> "A rule of construction for such a document was laid down by the Court of Queen's Bench in *Price v. Barker* (10), where it was held that, in determining whether the document be a release or a covenant not to sue, the intention of the parties was to be carried out, and, if it were clear that the right of the joint tortfeasor was intended to be preserved, inasmuch as such right would not be preserved if the document were held to be a release, * * *"

It can be seen from this quotation that absent a reservation of rights a document of release will release not only the named tortfeasor but all other tortfeasors.

Further support for the proposition that Mr. Abramson and plaintiffs' attorney, Mr. Cousins, misinterpret the *Friedman v. Segal* case is found in the language of *Israel v. Stoller,* a 1975 civil case no. 794/71, a translation of which is attached to Dr. Hermann's Affidavit. The Court in the *Stoller* case dismissed a suit against one

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tortfeasor on the existence of a release which released another tortfeasor. The Court in its opinion quoted language from *Friedman v. Segal,* C. A. 30/72.

> "Mr. Cohen (plaintiff's attorney) relied further on Civil Appeal 30/72 Supreme Court Judgments Volume 27/II page 225. Again it is sufficient to quote some of the established rulings referred to on page 225. 'The release of one out of joint tortfeasors does not entail the release of the others, *if it is so expressly stated,* in particular as an undertaking not to sue one of the wrongdoers is intended, whilst the right towards the other wrongdoers is preserved. An agreement not to sue one of the joint tortfeasors does not release the other tortfeasors, if it is clear that plaintiff intends to continue his claim against him.'" (emphasis added)
>
> "Consequently, this is exactly the established rule pointed out by Adv. Galili." (defendant's attorney).
>
> "To my opinion Adv. Galili correctly exposes the Israeli precedents. It is sufficient to refer in the subject matter to the judgment given in Civil Appeal 370/68, Supreme Court Judgment, Volume 18/I, page 533. On page 539 opposite to C-1-G Justice Agranat states as a matter which goes without saying the established ruling that 'pursuant to settlement of the claims of the injured parties by respondents (the insurer of the driver of the bus) also the driver of the truck is releases from all obligations towards them in respect of the damage caused to them'. He goes on and states that the Insurance Company of that truck driver is also relieved from any obligation, and refers to the precedents."

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"This is not an agreement not to sue the Guardian Eastern Company and its clients. This is, to my opinion, reflected in the most clear manner in Arts. 1 and 2 of the compromise, where it is said that plaintiff received from Guardian Eastern Company the amount of IL. 7,000.—"*in full, final* and *complete settlement* of *all my claims and demands, without* any *exception,* in *respect* of *everything connected with and/or* resulting from the aforesaid accident, *directly* or *indirectly*". Even stronger language is used in Art. 2: '*The payment mentioned above* includes *full, final* and *complete coverage* for *all damages and losses which have been caused to me, are being caused to me* and *will be caused to me, to my body and property, at any time,* as a result, both *direct and indirect* of the above accident. To avoid doubts, it is hereby expressly declared that the above amount includes hospitalization and medical expenses of all natures, both in the past and in the future.'" (Emphasis added).

"*I cannot imagine a stronger and clearer* language showing that *plaintiff received full satisfaction* in respect of all the *consequences of the accident, caused by whomever* they have been caused, and there *is not the slightest hint, that plaintiff reserves itself the right against anybody else.*" (Emphasis added).

It is important to note that the language contained in the release quoted above in the *Stoller* case is remarkably similar to the language contained in the Deeds of Release of Landau, Muscatel and Koren.

The third paragraph of the plaintiffs' General Releases states that the compensation they received from IAI was:

"* * * in *complete, final* and *full satisfaction* of *all my claims* and and demands in respect of *everything* resulting from said accident * * *."

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The fifth paragraph says:

> "The amount specified above includes *full, final* and *complete satisfaction* of all damages and/or losses of *any kind* or *nature* which have been caused to me and/or may be caused to me at *any time both directly, and indirectly,* as a result of the above said accident." (Emphasis added)

The *Stoller* case is the most recent case which deals with the subject of release and one which Mr. Abramson obviously neglected to cite or perhaps even to read.

On page 13 of Mr. Cousins' latest Memorandum of Law served on this Court on May 6, 1975, he states unequivocally that the above cited *Stoller* case, Civil Case No. 794/71 was overruled by the Israeli Supreme Court decision in *Friedman v. Segal,* Civil Appeal 30/72 also cited above. *Friedman* was decided in 1973 and *Stoller* was decided in 1975; it is therefore difficult to conceive how a 1973 decision can overrule a 1975 decision. Mr. Cousins' Memoranda are replete with these types of careless, unsupported remarks which are designed to mislead this Court.

The third and last of Mr. Abramson's attempts to explain the law of Israel regarding releases is based on a quotation that he takes from Tedechi's *Tort Law.* The quotation presented includes Mr. Tedechi's statement that the rule presented is his "approach" (opinion) as to what the law *should be,* as opposed to what the law *is.* Referring to Mr. Abramson's Affidavit at page 7, the following quotation from Mr. Tedechi appears:

> "*From our approach* the principle of the 'the unity of the cause of action' was not transferred to the Civil Wrongs Ordinance and it flows there from that. In Israel *we do not have to* follow responsibility of one tortfeasor per se does not release the other tortfeasor and therefore there is

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> no place (in Israel) for the distinction between a release and a covenant not to sue." (Emphasis added).

The tip off that Tedechi is stating what the law *should be,* is the use of the word "our" indicating that it is his "approach" (opinion) and also the use of the term "we do not have to" indicating that although the Courts of Israel *are* following the English Common Law Rule, the Courts do not necessarily have to.

Tedechi's opinion is discussed in Dr. Hermann's Affidavit and he clearly shows that the Rule of Law propounded by Tedechi in the quoted material found in Mr. Abramson's Affidavit on page 7 is not being followed by the Courts of Israel. The following are quotes from Dr. Hermann's Affidavit. Page 10, paragraph 13 sub par. c):

> "The gist of the English law is in a lucid and succinct manner reflected by Tedechi (*Supra*), para. 288, page 487: 'The established rule of the English Common Law was that the cause of action of the injured against joint tortfeasors is one and inadvisible. Three conclusions resulted therefrom (a) release given by the injured to one tortfeasor, released the other tortfeasors (hereinafter "the first thesis") (b) judgment given pursuant to a claim of the injured against one tortfeasor, according to which that tortfeasor was found liable, constituted *res judicata* in any additional claim of the injured against another tortfeasor, who has not been a party to the first claim. Pursuant to the judgment, the cause of action of the claim was merged in the judgment reflects the cause of action. Since there is only one cause of action, an additional claim against another tortfeasor cannot be sustained.

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("second thesis"); (c) judgment given in the claim of the injured against one tortfeasor, according to which the tortfeasor was released from liability, constitute, apparently, estoppel to the filing of an additional claim against another tortfeasor, who was not a party to the first claim. The failure of the claim of the injured negated the existence of the cause of action as a result thereof, the second tortfeasor can avail himself of the estoppel resulting from *res judicata* ("third thesis").

The "first thesis" discussed by Dr. Hermann is the English Common Law Rule which continues to exist today which I sum up as follows: A general release given to a single tortfeasor by an injured party which contains no reservation of rights as against other tortfeasors releases all tortfeasors. The English Common Law Rule and the Israeli adoption and continued use of this rule is further presented in Dr. Hermann's Affidavit in the following quotes. Page 12, paragraph 13 (e):

> "The established rule of the English Common Law was, and is still today, that release given by the injured to one out of more joint tortfeasors, releases also all other tortfeasors, since the release discharges the cause of action. This is not so in case of a covenant not to sue. Such an agreement leaves the cause of action in existence, and, therefore, does not affect the cause of action itself." (Tedechi, *Supra,* para. 289 (3), page 491);

Page 12, paragraph g (2):

> "As regards the first thesis, the Law of Torts does not contain any statutory provision. In view of this, the English Common Law Rules were, rather consistently, followed;" [In Israel]

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Page 13, paragraph h (1):

> "As regards the first thesis, the Israeli Courts followed consistently the principles of the English Common Law, namely that the release of one joint tortfeasor releases all other joint tortfeasors. This principle was based on the "single and inadvisible cause of action";

With this background Dr. Hermann then discusses Tecechi and shows clearly that Mr. Abramson is misconstruing the author. This misconstruction by Mr. Abramson raised serious doubts about his qualifications and ability to render a competent legal opinion in any area of the law. Dr. Hermann states as follows: Page 16, paragraph j (1) and (2):

> "Based upon *Zucker v. Leibowitz* (*Supra*), which stated that as regards the second and the third thesis (judgment recovered) the single and inadvisible cause of action principle does not apply, Tedechi (*Supra*) tried to apply the *Zucker v. Liebowitz* principle also to the first thesis, i.e., to the effect of the release of one tortfeasor on the liability of other tortfeasors;"

> "But, the Courts did not adopt the position advocated by Tedechi (*Supra*). The *Zucker v. Liebowitz* case was decided on 13.2.64. Supreme Court Justice Landau, who is one of the Judges who gave the judgment in the *Zucker v. Leibowitz* case, was also on the bench in the *Friedman v. Segal* case, which was given on 30.5.73, i. e., much later than the *Zucker v. Liebowitz* case. As pointed out above, the *Friedman v. Segal* case reconfirmed again the first thesis, as stated in the English Common Law."

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Dr. Hermann and Mr. Beinisch support each other with respect to the law of Israel and as it existed at the time the releases were signed. Both agree that the English Common Law Rule as stated above applies in Israel.

Counsel for plaintiff IAI in his Reply Memorandum at page 14 and again at page 16 somewhat clouds the issue of Israeli law. It is argued that the law of Israel today is exactly the same as the law of the State of New York today including General Obligations Law §15-108. It is implied that the change in the law of contracts as presented by Dr. Hermann was the equivalent of the New York change in 1972 under GOL §15-108. This is entirely incorrect. It should be pointed out that counsel for IAI's misconstruction of their own expert's Affidavit in this area is not crucial to their position. Counsel for IAI's misconstruction of Dr. Hermann's Affidavit appears at page 16 in the following language:

> "Accordingly the law of Israel and the law of New York identical with regard to the effect of releases in this case. That is, if one is to assume that the law as it existed prior to 1973 is applicable, plaintiff Zohar Landau, Mordechai Muscatel and Hagai Koren are precluded from all recovery. On the other hand, if the current laws of Israel and New York, the recovery must be reduced by 65% which is the share of the damages apportioned to the released tortfeasor, Israeli Aircraft Industries, Ltd."

This quotation assumed that the change in Israel in the law of contracts in 1973 changed the Israeli use of the English Common Law Rule concerning the effect of releases.

This misconstruction by counsel by IAI is not harmful to a correct interpretation of the law of Israel affecting the releases before this Court if the retrospective effect

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of the Israeli contract law is assumed to be the same as the retrospective effect of the 1972 change in the General Obligations Law. The retrospective effect of the law of contracts in Israel does not require examination since this change did not change the consistent Israeli practice of following English Common Law with respect to the effect of releases. Dr. Hermann states on page 13, paragraph (cc):

> "The leading rule in this matter, in which precedents are rather rare, was put forward by J. Salmon in *Cutler v. McPhail* (1962), 2 All E.R. 474, 476, as follows: "The principle is quite plain, that, if there is a release of one joint tortfeasor, the cause of action against all the tortfeasors is extinguished; on the other hand, if there is merely an agreement not to use one of several joint tortfeasors, the cause of action does not die and the other tortfeasors can properly be sued". Civil Case Jerusalem 306/68, District Court Judgments, 1969, page 186.

In summary, Mr. Abramson is not a practicing attorney in Israel as are Dr. Hermann and Mr. Beinisch and his qualifications in the area of tort law fall far below those of Dr. Hermann and Mr. Beinisch who have previously presented opinions to this Court and who were deeply involved with this case before and during trial. The presentation by Mr. Abramson must be disregarded since the entire basis for his presentation is undercut by his misciting and misquoting the Israeli precedents and Tedechi's treatise.

In the Memorandum of Law by Norman L. Cousins, counsel for the individual plaintiffs, it is conceded on page 35 of his memorandum that prior to 1969, the Israeli courts were following the English Common Law Rule namely that a release of one without a reservation released

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all others; Mr. Cousins then claims that by 1969 the law had changed. No citations or legal reasoning or analysis of his expert's opinion is presented to support this bold conclusion. Since he had nothing to support his contention of a change in the law it is correct to assume that the law as it existed, as Mr. Cousins admits, prior to 1969 continued to exist at the time that the releases which are before this Court were executed.

Mr. Cousins cited C.A. 30/72 in his paragraph immediately following his conclusion that the law had changed by 1969. C.A. 30/72 as presented in depth above does not stand for the proposition that the law of Israel is anything other than the English Common Law Rule. C.A. 30/72 could in no way support an Israeli change in the law dated 1969 since it is a 1973 case. (Hermann's Affidavit, page 14).

POINT III

THE PLEADINGS FILED BY KOREN, LANDAU AND MUSCATEL SHOULD BE STRICKEN PURSUANT TO FRCP RULE 11, AS SHAM AND FALSE

According to Rule 11 of the Federal Rules of Civil Procedure,

> "The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served."

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The complaints on behalf of Landau and Muscatel were filed on December 12, 1972, and that of Koren was filed on April 19, 1973. All were signed by William L. Schierberl, a member of Condon & Forsyth as attorneys for the individuals. According to papers filed on these motions by the same individual and the same firm (now as attorneys for IAI) there were no claims in existence belonging to Koren, Landau and Muscatel when the complaints were filed—all such claims having been released in 1970 and 1971. (See page 11 of the Memorandum of Law submitted by IAI).

As stated by Judge Bicks of this Court in *Freeman v. Kirby,* 27 FRD 395 (USDC, SDNY 1961), the purpose of the Rule is to require from plaintiff's counsel an affidavit that he has every reason to believe that his client will prevail. The attorney's signature must be more than a hollow gesture. There is an affirmative obligation that he be satisfied, in good faith, that there is good ground to support the claim. Judge Bicks then went on to strike plaintiff's complaint for failure to measure up to the requirements of the rule.

Since it is clear that at the time the complaints were filed there were in existence general releases and no attorney could reasonably suppose that a claim against Standard Precision would be sustained unless the existence of the releases did not come to light, it is respectfully suggested that if for no other reason, the complaint of Koren, Landau and Muscatel should be stricken for failure to comply with Rule 11.

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POINT IV

BY CONCEALING THE GENERAL RELEASES IAI AND LANDAU, MUSCATEL AND KOREN HAVE PERPETRATED A FRAUD ON THE DEFENDANTS AND UPON THIS COURT.

The facts and circumstances surrounding the surfacing of the General Releases executed by Landau, Muscatel and Koren are most revealing. No mention was ever made of any releases and they were not referred to in any documents produced by plaintiffs during discovery proceedings.

During plaintiffs' depositions, none of the individual plaintiffs ever mentioned the term release or intimated that such documents existed.

When the liability verdict was rendered and IAI was found 65% responsible for the loss of the aircraft and subsequent injuries to the plaintiff crew members, Mr. Landau informed his attorney, Mr. Cousins, that a written agreement was made with IAI that precluded Landau from recovering any further compensations from his employer IAI. Mr. Cousins was not aware of any such agreement prior to this time and asked Mr. Schierberl if he knew of any such agreements between the plaintiff crew members and IAI. Attorneys for defendants were not apprised of the existence of these releases until many weeks after the damages verdict was rendered on February 4, 1976 and the Court was not apprised of these releases until IAI raised them in support of its post-trial motion.

Mr. Cousins upon first learning of these releases from Mr. Landau should have informed the defendants' attorneys and the Court that agreements existed between plaintiff crew members and IAI which may have a substantial bearing on the right to recover 65% of whatever damages award the jury would render. These releases should have been produced at that time in order for the Court to make

a ruling on their legal effect. Instead, counsel for IAI and counsel for the crew members allowed the damages portion of the trial to proceed without apprising the Court of this evidence effecting the rights of the crew members and the rights of the defendant Standard Precision.

It is submitted that the failure of counsel for plaintiffs to divulge the existence of these releases to the defendants and the Court during trial constituted a fraud on this Court.

Landau's informing his attorney of these releases the moment IAI was declared 65% responsible for the plaintiffs' injuries is convincing evidence that at least Landau was fully aware from the beginning of this litigation that he had signed and issued a release to IAI which may have affected his right to proceed against other tortfeasors.

Counsel for the plaintiffs had a continuing duty, pursuant to defendants Notice to Produce all plaintiffs' personnel records, to at least inform attorneys for defendants that it had come to their attention that agreements had been signed between plaintiff crew members and IAI which precluded them from recovering any further compensation from IAI.

POINT V

THE TWO MEMORANDA SUBMITTED BY COUNSEL FOR LANDAU, MUSCATEL, AND KOREN SHOULD BE DISREGARDED SINCE THEY ARE FULL OF HEARSAY, UNSUBSTANTIAL ASSERTIONS, AND INTERNAL INCONSISTENCIES

Aside from the unsubstantiated assertions by Mr. Cousins that his client, Koren, did not sign the document submitted by IAI in support of its motion, there is at this

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time no dispute with respect to the authenticity of the releases or that they were duly executed. That being the case, parol evidence would be inadmissible to attempt to vary the terms of the releases. Fortiori the unsworn assertions of Mr. Cousins are totally inadequate to vary the terms of the releases and indeed an overview of Mr. Cousins' memoranda compels the conclusion that he has simply looked upon a list of defenses to a release, and has asserted all of them. Thus, at various times in his two memoranda Mr. Cousins has asserted the following:

1. Mistake of Law or fact (sup. memo page 4)
2. Contract of adhesion (memo page 7)
3. Scrivener's mistake (sup. memo page 5)
4. Rescission (sup. memo pages 6, 10)
5. Cancellation (sup. memo pages 6, 10)
6. Reformation (sup. memo page 8)
7. Estoppel (memo page 2)
8. No agreement—by Koren (memo page 25)
9. Untrustworthy translation (memo page 32)

It is respectfully suggested that any of these claimed defenses would require cogent evidence in order to vary the terms of the releases and indeed since the releases are clear on their face any such attempt would run afoul of the parol evidence rule even if competent evidence were being presented.

It is respectfully suggested therefore, that Mr. Cousins' many-sided attack on the releases must be disregarded *in toto.*

If a mistake was made regarding the releases as Mr. Cousins alleged it was not of a type or character to vary the terms of the release. Viewing the assertions in their

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memorandum most charitably in favor of Condon & Forsyth, it is clear that they and not IAI misunderstood the effect of the releases and so did not plead them as affirmative defenses in the New York actions. At most, this was a tactical error by that firm. There is no competent evidence in the record that either IAI or the three individuals had any misunderstanding as to what they did in 1970 and 1971. If a mistake was made it was made by Condon & Forsyth in deciding not to plead the releases, and this is not the type of mistake that supports reformation, rescission, cancellation or any of the other relief sought by Mr. Cousins. These defenses require clear and convincing evidence and an exception to the parol evidence rule. The failure of Condon & Forsyth to raise the releases in their answer was more probably motivated by the hope that Standard Precision would be held solely liable and in that case the releases would never surface.

The Court will undoubtedly have noted that Mr. Cousins' supplemental memorandum is internally inconsistent and is also inconsistent in certain respects with his first memorandum.

We will not burden the Court with all examples, but simply point out that at various times in his contradictory memoranda he has stated the following:

> "The 'agreements' signed by the crew members were contracts of adhesion." (memo page 7)
>
> "It was signed by Hagai Koren without the aid of advice of counsel." (memo page 23)
>
> "Further, the document was not obtained by Israel Aircraft or signed by Hagai Koren in a vacuum." (memo page 23)
>
> "Hagai Koren has consistently stated to me that he never signed any such agreement in Hebrew or otherwise." (memo page 25)

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"Exhibit C is Hagai Koren's agreement with Israel Aircraft." (memo page 29)

"Bearing in mind that Hagai Koren emphatically denies giving any release to Israel Aircraft . . ." (memo page 30)

"The agreements between Zohar Landau, Mordechai Muscatel and Hagai Koren were executed in Israel . . ." (memo page 33)

"No *claims* whatsoever were ever made by the crew members." (sup. memo page 12)

"The express desire of both IAI and its employees was to release all the crew members' claims against IAI." (sup. memo page 5)

His clients dropped all claims against IAI in return for certain payments. (sup. memo page 3)

A 1975 Israeli Court decision [794/71] was overruled by a 1973 decision [30/72]. (sup. memo page 13)

Did Koren make an agreement or didn't he? Did the plaintiffs file claims against IAI or didn't they?

In other matters, Mr. Cousins' Memorandum makes the following unsupported statements (among many others).

"Maybe Israel Aircraft thought those were general releases, but the crew members didn't." (page 7)

"We were not shown the documents but only told that 'somewhere', some piece of paper may exist." (page 7)

". . ., it can be stated without qualification that at no time did Israel Aircraft deliberately mislead the defendants or knowingly or deliberately conceal the existence of any general release." (page 11)

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> "More likely than not, the 'agreements' executed by the crew members at the request of the employer were in the legal files of their attorneys." (page 12)
>
> "The result was the creation of the Workmen's Compensation lien . . ." (page 24)

It is very curious that in spite of the critical effect which these releases have on the litigation, no affidavits by the parties to them have been submitted to the Court on these motions. The Court is told by Mr. Cousins (in Mr. Cousins' memorandum) that Hagai Koren signed the release without aid or advice of counsel (page 22 and 23 of the Memorandum of Law), but on page 25 Mr. Cousins states "Hagai Koren has consistently stated to me that he never signed any such agreement in Hebrew or otherwise." This must be cleared up, and the only way to do it is to bring Koren before the Court.

In lieu of the sworn testimony of the parties, the Court is offered Mr. Abramson's Affidavit setting out his "belief" as to the intent of the parties to the releases. It is respectfully submitted that the Court should disregard all of the hearsay and other statements in the Memoranda of Law, of both IAI and Landau, Muscatel and Koren until those statements have been established under oath by those with knowledge of the facts.

For example, it is stated in the Memoranda of Law submitted by IAI and Landau, Muscatel and Koren that neither Landau, Muscatel or Koren nor IAI informed their U. S. counsel of the existence of these releases. It is inconceivable that educated, intelligent, English speaking men would discuss such a matter with at least two law firms, Condon & Forsyth and Fuchsberg & Fuchsberg, and not mention that they had executed docu-

ments of this formality. To characterize these Deeds of Release as simple acknowledgements of *ex gratia* payments is to trifle with the Court.

Even more curious is the failure of either Memorandum of Law to refer to the agreement entered into in 1972 between IAI and these plaintiffs. This agreement is referred to in the opinion of Dr. Hermann and was apparently an agreement to modify the releases. IAI now reports this agreement as misfiled while the individuals ignore it. That agreement should have been produced pursuant to defendants' Notice to Produce all personnel records and it should now be before this Court.

POINT VI

STANDARD PRECISION ENDEAVORED WITH DUE DILIGENCE TO OBTAIN ALL PERSONNEL RECORDS OF LANDAU, MUSCATEL AND KOREN WHICH INCLUDED GENERAL RELEASES

Standard Precision served a Notice to Produce pursuant to FRCP Rule 34 on Condon & Forsyth, attorneys for Israel Aircraft Industries and the plaintiff crew members, on July 5, 1973. Condon & Forsyth did not object or move for a protective order pursuant to FRCP Rule 26 (c) which indicated that IAI and the plaintiff crew members intended to fully comply with the Notice to Produce and particularly item 11 requesting all personnel records of the plaintiff crew members. (Exhibit E)

As indicated in Standard Precision's Memorandum of Law in support of its cross-motion for summary judgment, a document marking session was held on January 10, 1974 in which Mr. Schierberl attorney for Israel Aircraft Industries and the plaintiff crew members, assured

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Mr. Fitzsimons, who was representing defendants, that the personnel records of the plaintiffs called for in item 11 were being obtained and would be served on the defendants.

Various documents were served on defendants regarding Landau, Muscatel and Koren which purportedly represented full compliance with item 11 of defendant's Notice to Produce. Defendants had no cause to believe that Condon & Forsyth, on behalf of all plaintiffs, had not fully complied with item 11. There was nothing in the documents that were produced that even vaguely suggested that Landau, Muscatel and Koren had filed claims against IAI based on the negligence of their employer which resulted in the execution of Deeds of Release and Full and Final Accord.

The documents produced by Condon & Forsyth regarding item 11 of defendant's Notice to Produce stated that the payment by IAI to Landau, Muscatel and Koren were *ex gratia* (gratuitous) and had to be reimbursed. Responses to similar questions directed to Landau, Muscatel and Koren during their depositions indicated that the payments by IAI had to be reimbursed, thereby leading attorneys for defendants to believe that there existed what we know as workmen's compensation liens on any recovery by the plaintiff crew members. Workmen's compensation payments are statutory and do not require general releases in order to receive payments; therefore, the existence of releases was not suggested and the plaintiffs never mentioned executing releases even after the issue of payments from IAI was raised.

It is suggested by Mr. Cousins that defendants failed to use due diligence and that their appropriate remedy

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was to make a motion to compel production of the releases; however, in his Memorandum of Law (page 5) he states:

> "By failing to plead the affirmative defense of general release required by FRCP 8 (c), the Court and the litigants were justified in believing that no general releases had been given by the crew members to Israel Aircraft."

Defendants could hardly be expected to move to compel production of releases when none of the documents produced during discovery or testimony received during depositions remotely suggested the existence of general releases.

It is certainly reasonable to expect that the general releases were in fact contained in the personnel records of the plaintiffs. The releases contained references to their future employment with IAI after accepting the payments from IAI.

Paragraph 5 of Landau's release states:

> "5. I confirm and agree that on payment of the amount, no obligation is or will be imposed on IAI to employ me in the future as a pilot, but as an engineer under the terms customary with the IAI in respect of engineers, and that to the extent that IAI will be interested at any time thereafter to employ me as a pilot, and I will be interested therein, the conditions of my employment shall be negotiated and agreed upon separately, taking into account the fact that compensation was paid to me under this deed."

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Paragraph 5 of Muscatel's release states:

> "5. I hereby confirm and agree that upon payment of the amount, IAI shall not be obliged and will not be obliged to employ me as a test flight technician, and I hereby agree to work in any other job imposed upon me under the terms customary with IAI in respect to such a job. IAI will continue to pay me each and every month, also in the future, irrespective of the job I will be employed in, a flight supplement in accordance with the grade I shall have at the time, and this as long as I will be in the employ of IAI."
>
> "6. It is further agreed that I will be allowed to be occasionally absent myself from my work without salary deduction, for the purpose of making checks and receiving treatment in connection with the accident, provided I shall submit a medical confirmation that the treatment or tests were necessary due to the accident, and provided further that I shall not be allowed to be absent more than 26 days per year."

The above cited language relates to the conditions governing plaintiffs' future employment with IAI and in Muscatel's case, conditions relating to job title and time off with full salary for future medical attention.

The general releases were a part of plaintiff's personnel records and there must have been numerous documents concerning plaintiffs' physical condition, medical treatments, job title and salary provisions which referred to the releases. None of the documents produced made any such references and it is obvious that defendants received only a carefully selected portion of the personnel records. Defendants had a right to, and did, rely

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on the fact that all plaintiffs' personnel records relating to this accident had been produced. Such was not the case for the releases were not produced until after the trial.

CONCLUSION

It is respectfully submitted that a fraud has been perpetrated upon the defendants and upon this Court in that General Releases were executed by Landau, Muscatel and Koren and withheld from defendants despite efforts to discover such documents and as a consequence, judgment should be entered in favor of Standard Precision.

Respectfully submitted,

MENDES & MOUNT
Attorneys for Defendants
DENNIS C. MURPHY
JAMES P. DONOVAN
Of counsel

Israel Aircraft Industries, Ltd.'s Supplemental Memorandum of Law of Plaintiff Israel Aircraft Industries, Ltd. in Support of Motion for Summary Judgment, Filed May 14, 1976.

THE POST-TRIAL MOTION PAPERS OF PLAINTIFF CREW MEMBERS AND DEFENDANTS CONTAIN MANY MISSTATEMENTS OF FACT

This Supplemental Reply Memorandum is submitted on behalf of Plaintiff Israel Aircraft Industries, Ltd. (hereinafter IAI) to correct misstatements of fact contained in the Post-Trial Motion papers of Plaintiff crew members and Defendants which were served after April 30, 1976.

On page 2 of their Memorandum of Law, the crew members refer to Exhibits "H" and "H-1" of Defendants' moving papers and indicate that items 12 and 13 therein were answers of Plaintiff IAI to written questions of Defendants.

In fact the written questions (referred to by Defendants as Exhibit "H") were submitted by counsel for IAI to be answered by the crew members. The answers (referred to by Defendants as Exhibits "H-2" and "H-4") were prepared by Plaintiffs Landau and Muscatel with the assistance of IAI personnel.

These informal and unsigned documents were provided to Defendants' counsel for their preparation for the depositions of the crew. It was expected that when and if further details or formal answers were required, they would be produced by counsel for the crew.

The present contention of the crew, that their own self serving statements "estop" Plaintiff IAI from clarifying a basic misunderstanding as to the relevance of the Releases to this litigation, is untenable.

Also in the Memorandum of Law on behalf of the Plaintiff crew members, it is stated that the crew were unaware that they signed releases and that the Releases were contracts of adhesion. However, not a single affidavit by Plaintiffs Zohar Landau, Mordechai Muscatel or Hagai Koren has been provided to support this position.

Israel Aircraft Industries, Ltd.'s Supplemental Memorandum of Law of Plaintiff Israel Aircraft Industries, Ltd. in Support of Motion for Summary Judgment, Filed May 14, 1976

Counsel for the crew professed ignorance of the existence of the Releases until the time of trial and that IAI hid the Releases for six years. However, his clients acknowledged the existence of such agreements on their depositions and they received copies of the Releases when they signed them.

In Point III of their Memorandum of Law, counsel for the crew contends that the Deeds Of Release In Full And Final Accord were not in fact releases because the crew reserved their rights to disability payments from the National Insurance Institute. This unsupported contention is in direct contradiction to all case law, statutory law and common law both in Israel and the United States. The Court is respectfully referred to Plaintiff IAI's Reply Memorandum of Law and to Art. 55c of the Law of Contracts of Israel and Section 15-108 of the General Obligations Law of New York which permit injured parties to reserve their rights to seek additional recovery against others by specifying such an intention in the release. Contrary to the crew members' contention that the reservation of rights against the National Insurance Institute indicates that the agreement was not a release, the fact that the crew recognized that they must reserve their rights is conclusive that they knew such rights would be lost if not specifically reserved.

The Affidavit of Ephraim Abramson is substantially the same as the other affidavits and memoranda submitted on behalf of the crew in opposition to the pending Motion. As such, it ignores the Releases and continues to reiterate that the crew have the right to pursue the non-released joint tortfeasors for duplicate compensation.

The Supplemental Memorandum of Law of Plaintiffs Landau, Muscatel and Koren contains similar inaccuracies

Israel Aircraft Industries, Ltd.'s Supplemental Memorandum of Law of Plaintiff Israel Aircraft Industries, Ltd. in Support of Motion for Summary Judgment, Filed May 14, 1976

and inconsistencies as their original Memorandum. Initially, counsel for the crew misstates Plaintiff IAI's position with regard to the misunderstanding of all U. S. counsel as to the difference between the laws of Israel and New York insofar as the relevancy of the Releases is concerned. IAI does not suggest that there was any misunderstanding between IAI and the crew with regard to the meaning and execution of the Releases when they were signed.

The Supplemental Memorandum submitted in support of the crews' position contains, finally, an acknowledgement that the crew indeed executed releases and were fully aware that they were signing releases at the time they were executed. However, the crew now seeks the extreme remedy of "rescission or cancellation" of the agreements on the grounds of "mistake". The sole support for this new theory is a statement by counsel for the crew members as to what was in the minds of IAI, Zohar Landau, Mordechai Muscatel and Hagai Koren at the time the Releases were executed five years ago. Not a single affidavit from Plaintiffs Landau, Muscatel and Koren has been provided which would indicate what they intended by the Releases. It is respectfully submitted that neither the crew nor IAI ever intended that any additional compensation would be paid to the crew by IAI either directly or indirectly and that they were fully aware that the Releases memorialized that understanding.

The obvious distortions contained on pages 11 and 13 of Plaintiffs' Supplemental Memorandum need not be considered here, but the misstatement in the last paragraph requires correction.

Therein, it is asserted that "Civil Case No. 794/71 . . . is completely contrary to and overruled by the Israeli Supreme Court decision in C.A. 30/72 . . ." C.A. 30/72 is

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the case of *Friedman v. Segal,* which was decided on February 27, 1973 almost two years *before Israel v. Stoller,* Civil Case No. 794/71, which was decided on February 4, 1975. *See* Dr. Hermann Memorandum at p. 14. Moreover, in *Israel v. Stoller* the Court concurred with the decision in *Friedman v. Segal,* but distinguished it for exactly the same reasons that it must be distinguished in this case.

In *Friedman,* the Court concluded that a releasor may reserve his rights against a named third-party if the release specifically indicates such an intention. *See, Israel v. Stoller* at p. 2, Exhibit "A" annexed hereto; *see also,* Dr. Hermann Memorandum at p. 14; Beinisch Affidavit at p. 3; Abramson Affidavit at p. 6. The releases in the case at bar did not contain a specific reservation of rights against anyone although rights to disability pension payments from the National Insurance Institute were excluded from the agreement. However, the relevant language in the *Israel v. Stoller* releases is almost identical to the Releases executed by the crew in this case.

Although pleading in the alternative is an accepted practice in most courts of the United States, factual arguments in the alternative are less common and a more difficult concept to accept. It has been argued, in opposition to these Motions, that the Deeds Of Release were not releases, that IAI fraudulently concealed the releases (copies were actually in the possession of the crew members), and that IAI is estopped from raising the releases as a defense. Now, however, it is contended that the only reason the releases were not disclosed was that Defendants didn't ask for them. Further, in the Supplemental Memorandum on behalf of the crew it is admitted that the agreements were releases.

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The argument in Point I of Defendants' Reply Memorandum of Law should not be given serious consideration by this Court. The only agreement between IAI and the crew was that IAI would advance the expenses necessary to prove liability of the Defendants for the accident and, in the event of recovery, the crew would bear a pro rata share of the expenses which were common to the property and personal injury actions. Of course, the crew were important witnesses on the liability aspect of the property damage claim whether or not they were parties to the action. There was nothing improper in these arrangements.

The relevant law of Israel necessary for the determination of this Motion, is succinctly summarized in *Israel v. Stoller,* Civil Case No. 794/71 (D.C. Tel Aviv 1975), where the Court stated:

> Mr. Cohen [plaintiff's counsel] relied further on Civil Appeal 30/72, Supreme Court Judgments Volume 27/II page 225. Again it is sufficient to quote some of the established rulings referred to on page 225. "The release of one out of joint tortfeasors does not entail the release of the others, if it is so expressly stated, in particular if an undertaking not to sue one of the wrongdoers is intended, whilst the right towards the other wrongdoers is preserved. An agreement not to sue one of the joint tortfeasors does not release the other tortfeasors, if it is clear that plaintiff intends to continue his claim against them". Consequently, this is exactly the established rule pointed out by Adv. Galili [Defendant's counsel]. *Israel v. Stoller,* Exhibit A at 2.

In *Stoller,* the Court put the many and varied arguments of all parties into their proper perspective and concluded:

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> My sole function is to study the documents before me. In order to interpret same, and in my opinion the interpretation is unequivocal in the sense that in this compromise, a statement of the claims of the injured party by the Guardian Eastern Company is reflected. This is not an agreement not to sue the Guardian Eastern Company and its clients. This is, to my opinion, reflected in the most clear manner in Arts. 1 and 2 of the compromise, where it is said that plaintiff received from Guardian Eastern Company the amount of IL. 7,000.- "in full, final and complete settlement of all my claims and demands, without any exception, in respect of everything connected with and/or resulting from the aforesaid accident, directly or indirectly." Even stronger language is used in Art. 2: "The payment mentioned above includes full, final and complete coverage for all damages and losses which have been caused to me, are being caused to me and will be caused to me, to my body and property, at any time, as a result, both direct and indirect of the above accident. To avoid doubts, it is hereby expressly declared that the above amount includes hospitalization and medical expenses of all natures, both in the past and in the future."
>
> I cannot imagine a stronger and clearer language showing that plaintiff received full satisfaction in respect of all the consequences of the accident, caused by whomever they have been caused, and there is not the slightest hint, that plaintiff reserves itself the right against anybody else. *Israel v. Stoller*, Exhibit "A" at 3.

The primary issue raised by the pending Motions, is the interpretation of the Releases which the crew signed and the determination of the effect of these Releases upon the amount that the crew members are entitled to recover.

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Plaintiff IAI adopts the clear and unambiguous language of the Releases. The crew members contend that they are entitled to collect 100% of their damages after arriving at "complete, final and full satisfaction of all [my] claims and demands in respect of everything resulting from the accident, excluding the disability pension payable [to me] by the National Insurance Institute". However, none of the Plaintiff crew members have submitted an affidavit or other evidence setting forth facts in support of their position that this Court should ignore the plain language and meaning of these Releases.

This matter can be reduced to a single question. That is, did the crew members at any time intend to recover any additional compensation from their employer IAI either directly or indirectly? Plaintiff IAI respectfully submits that the answer to this question is "no".

Conclusion

It is respectfully submitted that Plaintiff Israel Aircraft Industries, Ltd.'s Motion for Summary Judgment dismissing Defendants' Counter-Claims should be granted in all respects and that the judgments of Plaintiffs Zohar Landau, Mordechai Muscatel and Hagai Koren should be reduced accordingly.

Respectfully submitted,

CONDON & FORSYTH
Attorneys for Plaintiff
Israel Aircraft Industries, Ltd.
1251 Avenue of the Americas
New York, New York 10020
Tele: (212) 757-6870

Of Counsel:

William L. Schierberl
Marshall S. Turner

Exhibit A, Annexed to Foregoing Memorandum.

K/201/3/1

Translation From Hebrew

The District Court of Tel Aviv/Yaffo

Civil Case No. 794/71
Motion No.

Applicants: 1. State of Israel
2. Raphael Frankel

Respondents: 1. Zipporah Stoller
2. Ezra Reuven
3. Guardian Eastern Co.

D E C I S I O N

Mrs. Stoller had an accident in the year 1967, whilst riding a motorcycle driven by Raphael Frankel. The Statement of Claim contends that the accident was caused by a car driven by Ezra Reuven. The Insurance Company of Ezra Reuven is the "Guardian Eastern Company". Reuven Frankel was a soldier and the claim was filed in the year 1971 against Reuven Frankel and the State of Israel. A medical opinion of Dr. Kidron dated 17.5.68 was attached to the Statement of Claim.

The claim is in the amount of IL. 90,000.-.

In 1969 something happened, which is reflected in a document dated 10.11.69 entitled "Deed of Release and Final and Full Agreement". In this document Mrs. Stoller made a compromise with the Guardian Eastern Company and thereby, as a matter of course, also with Ezra Reuven, and received the amount of IL. 7,000.-. This fact is not reflected in the Statement of Claim filed against Reuven Frankel and the State, not even in the form of deducting

Exhibit A, Annexed to Foregoing Memorandum

from the amount of damages of IL. 90,000.- the amount of IL. 7,000 received by plaintiff.

Frankel and the State filed a motion to dismiss the claim filed against them in limine, based upon the compromise which, according to their opinion, constitutes what is called a release by way of accord and satisfaction (as distinguished from an agreement not to sue) which releases not only the direct parties to the agreement, but also all tortfeasors connected with that accident.

Mr. Galili who appeared in the name of Frankel and the State relies on the precedents which state that a compromise of this type releases all wrongdoers. Adv. Giladi who appeared in the name of Ezra Reuven and the Guardian Eastern Company (upon whom third party notice was served on behalf of Frankel and the State with the purpose of obtaining indemnity) joins the contention, whilst Adv. Cohen, Attorney for plaintiff, contends that, even if the compromise constitutes release by way of settlement of the claims, the Israeli precedents do not accept the version as pleaded by his opponents. He further contends that the compromise constitutes only an undertaking not to sue. To my opinion, Adv. Galili correctly exposes the Israeli precedents. It is sufficient to refer in the subject matter to the judgment given in Civil Appeal (370/63, Supreme Court Judgement, Volume 18/I, page 533. On page 539 opposite to C-D-E Justice Agranat states as a matter which goes without saying the established ruling that "pursuant to settlement of the claims of the injured parties my respondents (the insurer of the driver of the bus) also the driver of the truck is released from all obligations towards them in respect of the damage caused to them". He goes on and states that the Insurance Company of that truck driver is also relieved from any obligation, and refers to the precedents.

In opposition, Mr. Cohen relies on Civil Appeal 49/63, Supreme Court Judgement, Volume 18/I, page 337. However, to my opinion, this judgement has got no relation

whatsoever to the present question. There, the claim against one tortfeasor was dismissed, and it was decided that despite such dismissal, it is possible to file a claim against the other wrongdoer. It is sufficient to quote some of the precedents referred to on page 337, ie: "The difference between a judgement obliging a defendant to pay any compensation . . . for damages suffered as a result of a civil wrong and between a judgement dismissing the claim of plaintiff, even only due to lack of evidence, is not quantitative, but substantive. A judgement from the former class is based on positive findings in respect of the facts forming the cause of action of plaintiff according to the Civil Wrongs Ordinance, and even the assessment of the damages constitutes a positive finding. Whatever the amount of the assessment may be, large or small, in any case where a plaintiff succeeds to obtain judgement for the payment of compensation against one of the persons liable for the damage, the legislator found it appropriate, as to allow him to try to obtain a higher amount pursuant to a claim filed against the other persons responsible for his damage. This is the reason for the provision contained in Art. 64(1)(b) of the Civil Wrongs Ordinance. This shall apply to any plaintiff who did not succeed at all to obtain judgement for the payment of compensation from the first defendant. And, it makes no difference if his claim was dismissed because he did not prove the liability of defendant in torts, or, since he did not prove that damage was caused".

It results, therefore, that the question which was dealt with in that judgement was not the question of the meaning of any compromise, but as a matter of fact, problems of resudicata or estoppel were dealt with.

Mr. Cohen relied further on Civil Appeal 30/72, Supreme Court Judgments Volume 27/II page 225. Again it is sufficient to quote some of the established rulings referred to on page 225. "The release of one out of joint tortfeasors does not entail the release of the others, if it is

so expressly stated, in particular if an undertaking not to sue one of the wrongdoers is intended, whilst the right towards the other wrongdoers is preserved. An agreement not to sue one of the joint tortfeasors does not release the other tortfeasors, if it is clear that plaintiff intends to continue his claim against them".

Consequently, this is exactly the established rule pointed out by Adv. Galili. My sole function is to study the documents before me. In order to interpret same, and in my opinion the interpretation is unequivocal in the sense that in this compromise, a statement of the claims of the injured party by the Guardian Eastern Company is reflected. This is not an agreement not to sue the Guardian Eastern Company and its clients. This is, to my opinion, reflected in the most clear manner in Arts. 1 and 2 of the compromise, where it is said that plaintiff received from Guardian Eastern Company the amount of IL. 7,000.- "in full, final and complete settlement of all my claims and demands, without any exception, in respect of everything connected with and/or resulting from the aforesaid accident, directly or indirectly". Even stronger language is used in Art. 2: "The payment mentioned above includes full, final and complete coverage for all damages and losses which have been caused to me, are being caused to me and will be caused to me, to my body and property, at any time, as a result, both direct and indirect of the above accident. To avoid doubts, it is hereby expressly declared that the above amount includes hospitalization and medical expenses of all natures, both in the past and in the future."

I cannot imagine a stronger and clearer language showing that plaintiff received full satisfaction in respect of all the consequences of the accident, caused by whomever they have been caused, and there is not the slightest hint, that plaintiff reserves itself the right against anybody else.

Exhibit A, Annexed to Foregoing Memorandum

I give importance also to Art. 4 of the document, which contains a declaration of plaintiff that no person or body has any claim or demand in respect of the accident or anything connected therewith, or resulting therefrom, and plaintiff even undertakes to indemnify the "person receiving the claim or demand, if a claim will be made against him by any person or body, for any payment which he shall bear due to the above accident". Art. 5 contains an additional declaration, that only based upon its acknowledgements and statements, did the Insurance Company agree to pay to her what it did pay, and these statements included also the declaration contained in Art. 4. The declaration in Art. 4 covers also the possibility that someone else will apply to the Insurance Company with a demand for indemnity."

To my opinion the document is unequivocal and the conclusion is also unequivocal.

By virtue of the precedents referred to in the above judgement, Civil Appeal 37/63, I find that plaintiff has got no cause of action whatsoever against Frankel and the State. Therefore, I dismiss the claim filed in File No. 749/71 in limine. (Remark: the other two paragraphs related to the question of costs and expenses).

Given today 4.2.75 in the presence of Adv. Cohen, Adv. Giladi and Adv. Galili, attorneys for the parties.

(-) RAVEH
Judge

Letter, Dated October 29, 1976, From Condon Forsyth to Hon. Robert L. Carter.

CONDON & FORSYTH

1251 Avenue of the Americas

New York, N. Y. 10020

October 29, 1976

The Hon. Robert L. Carter
U. S. District Court for the Southern
District of New York
Foley Square
New York, N. Y. 10007

re: Israeli Aircraft Industries et al v. Standard Precision et al.
U. S. District Court—72-Civ 5359

Honorable Sir:

I do not intend that the serious and baseless charge with respect to myself and my client, Israeli Aircraft Industries, contained in this Court's Opinion of October 26, 1976, remain unanswered for even the period of time permitted by the Rules for an appropriate Motion.

Accordingly, I am writing at this time to record that the Court's statement that either I or my client has been guilty of a fraud upon this Court is without any foundation in fact. The Court's allegation is the more shocking since no opportunity whatever was afforded to me to answer, under oath, any questions as to the facts with respect to what the Court has characterized as a deliberate failure to disclose. As a consequence, the Court's conclusions are without any evidentiary foundation, are based on surmise and speculation, are untrue, and, it follows, unjust. The injustice is to me personally, to my client, and to my firm.

Letter, Dated October 29, 1976, From Condon Forsyth to Hon. Robert L. Carter

I have been a member of the Bar of the State of New York since March 23, 1959. I was admitted to practice before the U. S. District Court for the Southern District of New York on January 24, 1963. Further, I have been admitted to the Bar of the U. S. Court of Appeals for the Second Circuit since February 14, 1969. During the periods that I have been at the State and Federal Bar, I have tried numerous cases before Courts and juries. At no time has there ever been the slightest suggestion by any Court that any action on my part was improper. There has been no blemish whatever on my record or to my name until this Court made its baseless charge.

I shall, within the period permitted by the Rules, file an appropriate Motion to re-argue the substantial legal issues involved. I am ready at any time to give testimony, under oath, with respect to the relevant facts. However, in view of the serious nature of the Court's unfounded, unfair and unjust charge against myself and my client, I am compelled to register an immediate objection by means of this communication.

Respectfully,

CONDON & FORSYTH
WILLIAM L. SCHIERBERL

WLS/ros

cc/ Dennis Murphy, Esq.
Mendes & Mount

Messrs. Fuchsberg & Fuchsberg

Delivered by Hand of:
William L. Schierberl, Esq.

Israel Aircraft Industries, Ltd.'s Memorandum of Law in Support of Motion for Reargument Pursuant to Local Rule 9, Filed November 8, 1976.

STATEMENT OF FACTS

This is an action for four separate and distinct claims arising from the crash of a Jet Commander aircraft, Serial No. 029, in Israel on January 21, 1970. Plaintiffs Zohar Landau (hereinafter Landau), Mordechai Muscatel (hereinafter Muscatel) and Hagai Koren (hereinafter Koren) were crew members aboard the aircraft at the time of the accident. They brought this action to recover damages for the personal injuries they sustained when they were forced to evacuate the aircraft. Plaintiff Israel Aircraft Industries, Ltd. (hereinafter IAI) brought this action to recover the value of the aircraft destroyed in the crash. The only defendant relevant on this motion is Standard Precision (hereinafter SP). SP counterclaimed against IAI for indemnity and contribution.

At the conclusion of the trial of this action, on February 4, 1976 the jury returned a verdict for all plaintiffs against defendant SP and, under the applicable law of Israel, concluded that SP was 35% responsible for the cause of the crash and that plaintiff IAI was 65% responsible.

On March 8, 1976, defendant SP moved for a new trial. On March 26, 1976 plaintiff IAI served its Affidavit in Opposition to SP's Motion and cross moved to dismiss SP's counter-claim on the grounds that the verdicts for the crew members must be reduced by IAI's share of the liability because the crew had settled their claims with IAI and had executed full releases in favor of IAI.

On March 29, 1976 this Court denied SP's motion for a new trial. However, on April 20, 1976, SP cross moved to IAI's pending motion for leave to amend its answer to assert the releases as an absolute bar to the recovery of the crew.

Israel Aircraft Industries, Ltd.'s Memorandum of Law in Support of Motion for Reargument Pursuant to Local Rule 9, Filed November 8, 1976

On October 26, 1976 this Court rendered its decision on IAI's motion and SP's cross motion. In its Order, the District Court, *sua sponte,* dismissed not only the complaints of the crew members, but also the complaint of IAI on the grounds that plaintiffs Landau, Muscatel, Koren, IAI and counsel for all plaintiffs perpetrated a fraud on the Court by failing to disclose the releases raised in IAI's motion until after the trial.

It is respectfully submitted that there is no factual basis for this Court's findings and no legal basis for the Court's drastic action of dismissal of the Complaint of IAI.

POINT I

THE DISTRICT COURT ERRED IN DISMISSING IAI'S ACTION BECAUSE OF FRAUD OR MISCONDUCT UNDER FRCP RULES 37 AND/OR 60(b) WITHOUT A HEARING

In the Opinion dated October 26, 1976, the District Court made findings of fraud and misconduct and without a hearing levied the sanction of dismissal of all complaints. IAI contends that its legal rights to a judgment in its favor against SP were denied, because the finding of fraud or misconduct was made without a hearing or evidentiary support. IAI contends that due process is denied where the sanction of dismissal is imposed under Federal Rules 37 and/or 60(b) without a hearing. A hearing and submission of evidence would show that neither IAI nor its counsel, Condon & Forsyth, were guilty of fraud or misconduct in this action.

On the basis of the evidence which would be submitted at such a hearing, the Court could not and would not make such a finding. IAI and its counsel, Condon & Forsyth,

Israel Aircraft Industries, Ltd.'s Memorandum of Law in Support of Motion for Reargument Pursuant to Local Rule 9, Filed November 8, 1976

therefore, request a hearing for the purposes of expunging from the record the findings contained in this Court's Opinion of October 26, 1976 and for establishing to the Court's satisfaction that no fraud or misconduct was committed by IAI or its counsel. Upon such showing, IAI contends that a judgment should be entered in favor of IAI against SP in the amount of 34% of the damages found by the jury as representing the value of the aircraft at the time of the accident.

In *Universal Oil Products Co. v. Root Refining Co.*, 328 U. S. 575 (1946), the Supreme Court addressed the question whether the judgment entered in that case should be set aside because fraud tainted and invalidated the judgment. The Supreme Court stated:

> The inherent power of a federal court to investigate whether a judgment is obtained by fraud is beyond question [cites]. The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation. But if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be preserved. No doubt, if the Court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of proceedings could justly be assessed upon the guilty parties . . . [cites]. But, obviously, a court cannot deprive a successful party of his judgment without a proper hearing. 328 U. S. at 580. See also, *Calland v. United States*, 323 F. 2d 405, 408-409 (7th Cir. 1963).

Israel Aircraft Industries, Ltd.'s Memorandum of Law in Support of Motion for Reargument Pursuant to Local Rule 9, Filed November 8, 1976

In this case the drastic remedy of dismissal was impcsed under Rule 37. In *Flaks v. Koegel,* 504 F. 2d 702 (2d Cir. 1974), the Second Circuit found that the District Court in that case abused its discretion in dismissing a pleading and entering a default judgment against the defendant without a hearing on issue of willfulness and other improper conduct. Said the Court:

> There is no question but that dismissal of a pleading is the most drastic sanction provided by the Rule. [Rule 37]
>
> The Rule has constitutional limitations which were noted in Mr. Justice Harlan's opinion for the Court in *Societe Internationale v. Rogers,* 357 U. S. 197, 209, 78 S. Ct. 1087, 1094, 2 L. Ed. 2d 1255 (1958), in which he stated:
>
> The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in *Hovey v. Elliott,* 167 U. S. 409 [17 S. Ct. 841, 42 L. Ed. 215] and *Hammond Packing Co. v. Arkansas,* 212 U. S. 322 [29 S. Ct. 370, 53 L. Ed. 530]. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations. See Notes of Advisory Committee on Rules, Rule 37, 28 U.S.C. (1952 ed.), p. 4325.

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On the record before it, the Court decided

> that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.

357 U. S. at 212, 78 S. Ct. at 1096 (footnote omitted).
504 F. 2d at 708-709.

There were a number of underlying facts or assumptions, taken as true, by the District Court which were in fact erroneous, and IAI has not had the opportunity to demonstrate this by a proper evidentiary hearing. IAI's motion to dismiss the counter-claim was solely a legal question. However, the motion was decided on another ground, based on unlitigated issues of fact, —fraud and misconduct—, facts found without a proper hearing. As a result, IAI's reputation in the business community has been affected. The reputation of Condon & Forsyth, as officers of this Court, has been placed in question in the legal community. It is submitted that the Court did not have before it the evidence necessary to draw proper and correct inferences on issues of fraud and misconduct. Thus, a hearing is clearly necessary to satisfy the Court that no improper conduct nor fraud took place.

Illustrative of the Court's erroneous assumptions which would be corrected at a hearing are the following:

1. The most critical erroneous assumption is that counsel for IAI *were aware* of and had possession of these releases of Landau, Muscatel and Koren at the time the suit was commenced, or at an early stage of the litigation. This is simply not true. Although IAI was aware of the

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releases (since IAI was a party to them), neither U. S. counsel for IAI nor its Israeli counsel, who participated in the preparation of this case, was aware of the existence of the releases until January 30, 1976. This was three days after the liability verdict was rendered by the jury. It was on January 30, 1976 that counsel for the individual plaintiffs advised counsel for IAI that plaintiff Landau "recalled signing a legal document containing a hold harmless clause between himself and IAI." On January 31, 1976, U. S. counsel for IAI telexed IAI in Israel and requested a copy of this document. See Affidavit of William L. Schierberl, sworn to November 5, 1976, submitted hereto. On February 3, 1976, a translation of Landau's release was telexed to IAI's New York office and was received at the offices of IAI's counsel on February 4, 1976. However, it was not reviewed until the evening of February 4, 1976 when counsel returned to their office after the trial of this case had concluded. See Affidavit of William L. Schierberl, sworn to November 5, 1976, submitted hereto.

It is clear that the Court *assumed* that IAI's New York counsel possessed the releases from the time the lawsuit was commenced, when the Court writes:

> IAI's lame excuse that its attorneys in New York did not understand the meaning of the instructions drawn by its attorneys in Israel cannot justify its failure to disclose the release as an affirmative defense to SP's counter claim. Court's Opinion, p. 12-13; See also reference relating to Complaint signed by William L. Schierberl.

At a hearing it will be shown that the IAI counsel did not have copies or knowledge of the releases until after the conclusion of the liability case. At the hearing it would

be shown that while IAI had possession and awareness of the existence of the releases, IAI did not understand, appreciate or anticipate any possible effect such releases might have on an action by either IAI or the crew against a third party (SP). The hearing will show that throughout the trial of the action, as well as the discovery phase, all parties and their counsel assumed that the payments which were made by IAI to the members of the crew were in the nature of compensation, disability or a similar form of payment. At a hearing, it will be shown that New York counsel was not aware that in Israel an employee could sue his employer. If New York counsel were aware that an employee could sue his employer, further inquiry would have been made as to whether there were any releases or documents settling the claim of the employee against the employer.

The hearing will show that IAI neither fraudulently nor knowingly sought to conceal essential facts or documents from the Court. The evidence will show that IAI simply did not appreciate the possible impact of these releases on the legal action pending in the United States involving a third party.

It would be illogical, if fraud were the motive, to disclose the releases after the verdict. IAI had no motive in concealing the existence and terms of these releases in relation to its hull action, since this action involved purely a subrogated matter and IAI had been fully compensated by its insurers. The motion that IAI's hope to recoup its settlements with the crew provided sufficient motive is easily dismissed. The settlements which resulted in the releases at issue amount to, at current exchange rates, less than U. S. $11,000. It is illogical to conceive that IAI would conceal these releases and jeopardize underwriters' claim for damages in the amount of one million dollars,

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simply to recover from the crew $11,000. Israel Aircraft Industries, Ltd. is one of the most prominent and respected industrial companies in Israel. Such assumed conduct simply does not make economic or business sense. The fact of the matter, as the hearing will show, is that the persons who had possession of the releases (IAI) did not understand or appreciate the impact or the significance of the releases in an action pending against the third-party in the United States. The New York counsel who would have appreciated the possible ramifications of such releases were not aware of them. All New York counsel was aware of was that compensation payments were made by an employer to an employee. The Court's suggestion of fraud on the part of IAI and/or Condon & Forsyth in secreting the release is without basis, and IAI and Condon & Forsyth are certain that a hearing will satisfy the Court that no fraud or misconduct took place; that the parties and their counsel have acted in a manner consistent with the rules of this Court and the high ethical standards which this Court seeks to uphold, and that the parties and their counsel have met not only their private responsibilities, but their public responsibilities to the Court as a public institution.

2. On July 5, 1973, SP served their Notice for Production of Documents upon Condon & Forsyth, who at the time, were attorneys for all plaintiffs. Item No. 11 requested:

> "11. All personnel records of the individual plaintiffs which are in the possession or control of Israel Aircraft Industries, Ltd., including but not limited to payroll, medical, hiring, training and work of the individual plaintiffs as employees of said Israel Aircraft Industries, Ltd."

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After numerous delays requested by defendants a document marking session was conducted on January 10, 1974, at which the following exchange between counsel occurred:

> "Mr. Fitzsimmons [for the defendants]: Do you have anything at all to produce with respect to item No. 11 calling for the personnel records of the individual plaintiffs?
>
> "Mr. Schierberl [for plaintiffs]: Not at this time. We are obtaining those records and as soon as we have them I will give them to you" Transcript of Meeting of January 10, 1974 at pp. 120-121.

A hearing will show that shortly thereafter counsel for IAI produced all documents concerning the crew, which were in their possession. Thereafter, on July 16, 1974, Fuchsberg & Fuchsberg replaced Condon & Forsyth as counsel for the crew.

On September 30, 1974, SP moved to dismiss the complaints, pursuant to FRCP Rule 37(d), on the grounds of failure to produce documents, and specifically referred to Item 11 of their Notice which requested the crew's personnel records.

Condon & Forsyth opposed defendants' motion on several grounds including delay of trial and harassment and with specific reference to Request No. 11 stated

> Upon information and belief the personal counsel for plaintiffs Landau, Muscatel and Koren have transmitted or are in the process of transmitting all personnel records to defendants' counsel.

On November 15, 1974, this Court, by Order of the Honorable Robert L. Carter, filed on the 19th day of November, 1974, denied defendants' motion. Plaintiff IAI respectfully submits that it was erroneous for this Court

to find that IAI counsel was nonresponsive to Request 11. More critically, however, the Court finds that the failure to produce the personnel files was a failure to disclose the releases. However, there is no basis in the record for finding or assuming that the releases were contained in the personnel records. By the time of the hearing IAI will be able to show exactly where the releases were kept. Since the Court denied SP's Motion to Compel production of the personnel records at to IAI, it is respectfully submitted, that it cannot be contended that IAI deliberately concealed them from defendants.

Therefore, plaintiff IAI respectfully submits that the Court, in reaching its finding, was influenced by an assumption that the releases were in the personnel records, and that IAI and its counsel thwarted the discovery process undertaken by SP. A hearing will enable IAI to fully develop these matters, and to demonstrate to the Court that its assumptions were mistaken.

3. On the ground stated by the Court for its findings of fraud is "Muscatel's misleading responses at his deposition". See, Opinion page 20. IAI counsel, Condon & Forsyth, did not represent him at the time of his deposition and his statements can in no way be attributed to IAI. In any event, the answers were neither false nor fraudulent, as will be fully developed at a hearing.

4. Another basis stated by the Court for its findings of fraud concerned the "interrogatories asked by SP relating to crew members Muscatel and Landau" as follows:

"12. Payment made by IAI IL 10,000—

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> 13. . . . . [P]aymer t per para. 12 is not a question of law since it was an ex gratia grant; it was now agreed that in case Mr. Muscatel's action is successful, he will refund this grant out of the proceeds."
>
> (*Re*: Accident to Jet Commander 029 on 21.1.1970, Mordechai Muscatel at p. 1.)
>
> "12. Injury payment and reparation for loss of future income of the amount of IL 75,000 were made by IAI.
>
> 13. . . . The payment made by IAI is not subject to law as it was an ex gratia payment; it was agreed that in case the present action succeeds, it will be refunded to IAI out of the proceeds."
>
> (*Re*: Accident to Jet Commander 029 on 21.1.70, Zohar Landau, at p. 1.).

In fact, these were not interrogatories asked by SP but rather part of a complete list of information which was requested by counsel for IAI through their corresponding counsel in London, who was in direct communication with IAI in Israel. See list of questions and answers relating to Landau and Muscatel, dated September 13, 1972 by John L. Brooks, Esq., attached to SP's Notice of Cross Motion as Exhibits H, H-2 and H-4, annexed to this Brief for the convenience of the Court.

These documents were transmitted by counsel for IAI to SP as constituting all of the documents in their possession concerning the claims of the crew members, even though counsel could have declined to disclose them as privileged documents. Rather, counsel for IAI chose disclosure, which does not comport with fraud and concealment.

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Although the reference in response 13 to "*ex gratia* grant [payment]" is not accurate as American lawyers define the term, it is necessary to determine, at a hearing, the meaning of the term as used in Israel. Such definition would form a proper predicate as to whether the language used was false and misleading. In any event, use of the term "*ex gratia*" cannot be considered sufficient basis for finding that plaintiff IAI deliberately concealed releases and perpetrated a fraud on this Court. SP had the opportunity to fully explore this point but SP's counsel, as all counsel, believed that these payments were compensation or industrial payments by an employer to an employee. A proper hearing will afford IAI and its counsel a means by which they could satisfy the Court that no fraud or misconduct had been committed. The above factual assumptions can be resolved by evidence in the record.

There are additional legal issues that should be resolved by Briefs. The Court cites IAI's failure to disclose the releases in the complaint, yet, apart from the fact that IAI's U. S. counsel had no knowledge of the releases, there seems to be no rule of Court or judicial precedent for the ruling that the existence of a release must be alleged in a complaint.

Even if the crew's statements or conduct should preclude them from recovery, this court should not infer similar acts to IAI to firm a basis for dismissing IAI's claim for property damages, which was entirely distinct and unrelated to the releases or the personal injury claims of the crew. The issue of IAI's property damage claim was finally resolved seven months prior to the rendering of this decision when the Court denied SP's motion for a new trial.

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The Court had alternatives to the drastic conclusion it reached. The most reasonable alternative would have been to grant defendant SP's post-trial motion to amend its answer pursuant to Rule 15(d) of the Federal Rules of Civil Procedure, to assert the releases as a defense or partial defense as to the judgment of the crew members. Since the effect of the releases upon the crew's verdict and the judgment entered therein is clearly a question of law, the jury's findings were in any event necessary to resolve the claim made by IAI against SP. The releases, and their effect, would not have precluded a trial between IAI and SP, and do not, as a matter of law, relate in any way to the claim of IAI against SP for loss of the aircraft.

POINT II

THE COURT ERRED IN DISMISSING IAI'S COMPLAINT PURSUANT TO FRCP RULE 37(2) (B) (C) BECAUSE THERE WAS NOT A PRIOR OUTSTANDING DISCOVERY ORDER

Rule 37(b) (2) (c) of the Federal Rules of Civil Procedure provides:

> FAILURE TO MAKE DISCOVERY : SANCTIONS
>
> (a) * * *
>
> (b) *Failure to Comply with Order.*
>
> (1) * * *
>
> (2) *Sanctions by Court in Which Action is Pending.* If a party or officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit

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> discovery, including an order made under subdivision (a of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) * * *
>
> (B) * * *
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> (D) * * *

Although the Court relied upon Rule 37(b) (2) (c) for its power to dismiss IAI's claims (See, Opinion, at page 13), the Court stated that Rule 37(b) (2) (c) ordinarily was "* * * not appropriate absent an existing Court order to provide or permit discovery which has been disobeyed". However, the cases relied upon by the Court for its conclusion clearly hold to the contrary.

In *Marshall v. Ford Motor Co.*, 446 F. 2d 712 (10th Cir. 1971), the Tenth Circuit affirmed the District Court's refusal to impose sanctions upon a party for failure to comply with various discovery procedures. Clearly this is not support for this Court's drastic action in dismissing not only the complaints of the crew members but the complaint of IAI. In fact, the case more truly stands for the proposition that use of such drastic sanctions is inappropriate where there are no outstanding orders compelling discovery.

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In *B. F. Goodrich Co. v. Lyster,* 328 F. 2d 411 (5th Cir. 1964) the trial judge also departed from the requirements of Rule 37 in that he levied the sanction of precluding the use of the deposition of a witness at trial because of the witnesses failure to answer three questions at his deposition "despite the fact that no actual order appears to have been made." 328 F. 2d at 415.

The Court laid down the guiding principles for using Rule 37:

> We read Rule 37 as establishing a flexible means by which a court may enforce compliance with the Federal discovery procedures through a broad choice of remedies and penalties. See *Rosenberg, Sanctions to Effectuate Pretrial Discovery,* 58 Col. L. Rev. 480 (1958); *Developments in the Law—Discovery,* 74 Har. L. Rev. 940, 991 (1961). Although a trial judge's latitude in framing orders and in penalizing failures to comply is broad, his discretion is not limitless. *Mitchell v. Johnson,* 5 Cir. 1960, 274 F. 2d 394; *O'Toole v. William J. Meyer Co.,* 5 Cir. 1957, 243 F. 2d 765; *Independent Productions Corp. v. Loew's, Inc.,* 2 Cir. 1960, 283 F. 2d 730. And although Rule 37(b) applies to all failures to comply, whether wilful or not, the presence or lack of good faith in the parties is relevant to the orders which should be given and the severity of the sanctions. *Societe Internationale Pour Participations Industrielles v. Rogers,* 1958, 357 U. S. 197, 207, 78 S. Ct. 1087, 2 L. Ed. 2d 1255. 328 F. 2d at 415

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The court reversed and remanded for a new trial on the ground that the trial judge abused his discretion in imposing the sanction stating:

> The Rules are a means—not an end of Justice. "In final analysis, a court has a responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a serious showing of willful default". *Gill v. Stolow,* 2 Cir. 1957, 240 F. 2d 669, 328 F. 2d at 416

Rule 37 is designed to conform to important notions of due process as discussed in Point I. Rule 37(b) (2) and the sanctions provided therein are explicitly limited to situations where a party has failed to *comply* with an *order* of the court. This is meant to conform to the due process element of notice.

The complete absence of notice to defendant before the imposition of sanctions, as has occurred here, is contrary to the very letter, as well as "the general interpretation of the Rule 37". This is especially so where the ultimate sanction levied by the Court, without foundation in fact or law, has been imposed in a manner that may result in serious damage to the reputations of plaintiff IAI and its counsel.

CONCLUSION

Israel Aircraft Industries, Ltd. and its counsel Condon & Forsyth respectfully request a hearing on the issues of fraud and misconduct which form the basis of the Court's decision of October 26, 1976. Israel Aircraft Industries and Condon & Forsyth request an opportunity to submit affidavits and to present sworn testimony on

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the matters relied upon by the District Court in entering its Order dismissing the Complaint of Israel Aircraft Industries, Ltd. against Standard Precision.

Upon a showing that there was no misconduct or fraud on the part of Israel Aircraft Industries and Condon & Forsyth, Israel Aircraft Industries, Ltd. respectfully prays that the findings of the Court in its opinion of October 26, 1976 relating to fraud and misconduct be expunged from the record of this case and judgment be entered in favor of Israel Aircraft Industries against Standard Precision in the amount of 35 percent of the amount the jury found to be the value of the aircraft in the accident.

Respectfully submitted,

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Of Counsel
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THOMAS J. WHALEN
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(Exhibits annexed hereto are omitted in printing.)

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STATEMENT OF FACTS

The factual underpinnings of this motion are set forth in the accompanying affidavits of Herzela Ron, General Counsel for Israel Aircraft Industries, Ltd. ("IAI") and Selvyn Seidel dated November 5, 1976 and are not repeated separately here.

STATEMENT OF APPLICABLE LAW

The right of a party to retain counsel and modify its representation is firmly established in the court of the Southern District of New York. *F. Palicio y Compania, S. A. v. Brush,* 256 F. Supp. 481, 485 (S.D.N.Y. 1966); *Gangewere v. Bernstein,* 199 F. Supp. 38, 39 (S.D.N.Y. 1961).

The Ron and Seidel affidavits raise serious material issues of fact with respect to the extent of IAI's knowledge of and participation in the prior proceedings herein which cast doubt on some of the factual premises underlying this Court's October 26, 1976 Opinion. In view of the extraordinary impact of the October 26th opinion on its reputation and business IAI respectfully submits that in the circumstances of this case fundamental due process standards require that IAI be afforded an opportunity to gather and present to the Court exculpatory factual material which IAI believes will lead this Court to revise its October 26th opinion and remove the stain of fraud from its escutcheon. See, *Flaks v. Koegel,* 504 F. 2d 702, 711-13 (2d Cir. 1974).

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CONCLUSION

Based upon the foregoing and the affidavits of Herzela Ron and Selvyn Seidel dated November 5, 1976 it is requested that the Court issue its order permitting Hale Russell Gray Seaman & Birkett to appear as special counsel for IAI, granting such special counsel leave to submit on or before December 6, 1976 such motions for relief, supporting affidavits, documents or other evidence as may become appropriate and affording such other relief as the Court determines to be just in the circumstances.

Respectfully submitted,

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Special Counsel to Plaintiff, Israel Aircraft Industries, Ltd.

Dated: New York, New York
November 5, 1976

Service of two copies of
the within is
hereby admitted this 22nd day
of Apr., 1977
Reuben Hecht & Fuchsberg
Attorney for Appellants

Service of two copies of
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hereby admitted this 22nd day
of April, 1977
Wendell & Jensen
Attorney for Israel Aircraft Industries Ltd